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Supreme Court of the United States

OCTOBER TERM, 1952

No. 340

WILLIAM B. FOWLER, APPELLANT,

vs.

STATE OF RHODE ISLAND

APPPEAL FROM THE SUPREME COURT OF THE STATE OF RHODE ISLAND

FILED SEPTEMBER 17, 1952
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[fol. 1]

IN THE SUPREME COURT OF THE STATE OF RHODE ISLAND

Ex. &c. No. 9264

STATE

v.

WILLIAM B. FOWLER

OPINION

FLYNN, C. J.:

This is a criminal complaint charging the defendant with violating section 11 of chapter 149 of the ordinances of the city of Pawtucket by making an address to a religious meeting in a public park owned and maintained by that city. The case was tried first in the tenth judicial district court and following defendant's conviction and sentence he duly appealed to the superior court. However, before trial and by leave of court defendant filed a motion to quash the complaint. Thereupon the superior court certified to this court for determination, in accordance with general laws 1938, chapter 545, § 6, as amended by public laws 1940, chap. 941, sec. 2, certain questions of doubt and importance as to the constitutionality of the ordinance.

Upon consideration thereof we held in substance that the ordinance on its face was not designed to interfere with defendant's rights of freedom of speech, or of assembly, or of religion; that it was part of a regulatory and nondiscriminatory ordinance which was enacted many years ago to secure the maximum reasonable and orderly use of the park by the public for rest and recreation; that in effect it was similar in purpose and principle to the one which was involved in the case of *Davis v. Massachusetts*, 167 U. S. 43; that, since the unequivocal statement of law in the [fol. 2] *Davis* case had not been overruled by the United States supreme court, we could not say beyond a reasonable doubt that the ordinance here was unconstitutional and in violation of the first and fourteenth amendments to the United States constitution; and further that it did not vio-

late similar guaranties of such rights, in the constitution of this state. *State v. Fowler,* · R. I. , 83 A. 2d 67.

Accordingly the case was remitted to the superior court where, after a trial *de novo* in which jury trial was specifically waived, defendant was convicted and sentenced to pay a fine of $5 and costs. Thereupon he duly prosecuted his bill of four exceptions to this court, but only the first, second and fourth are now being pressed. The third, being neither briefed nor argued, is deemed to be waived under our practice.

The evidence is either admitted or not disputed. The defendant is a resident of Arlington, Massachusetts, and is a minister of the group known as Jehovah's witnesses. He was invited by the local or Pawtucket members of such group to deliver a bible discourse to their assembly to be held in Slater Park on September 3, 1950. The city of Pawtucket owns that park, which has an area of approximately 194 acres and is situated in the residential section of the city. For a great many years it has been maintained as a public park having a variety of facilities for rest and recreation. These range generally from tennis courts to formal gardens. The mere assembly of a group of people, excluding, however, any public address with or without the aid of a sound-magnifying device, could be held without unduly interfering with the use of the park by others.

[fol. 3] From 1916 to date use of the park has been regulated in the public interest by the ordinance in question and a nondiscriminatory administration thereof. That ordinance, chapter 149, contains sixteen sections, many of which are unrelated to the exercise of constitutional rights. It appears in full as an appendix to our previous opinion in this case, to which reference is hereby made. *State v. Fowler, supra.* Section 11 thereof, which is at the base of the instant controversy, reads as follows: "No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park."

The local members of the group had received permission previously to hold religious assemblies and had used the

park for such purposes on two preceding Sundays. However, contrary to the express terms of the ordinance, defendant on September 3, 1950 began to address about 400 persons who had assembled there for a religious meeting. Approximately 150 of the assembly constituted members of the religious group and the other 250 were strangers who had come as invitees to such meeting. The latter probably were not residents of the city.

It is not disputed that defendant began to address the meeting with the aid of a microphone and *two* "loud speaker" devices; that he thus proceeded with his address sufficiently to define its religious character before interruption by the police; and that the address as made was admittedly contrary to the literal provisions of the ordinance. After being interrupted politely by the police, defendant was invited to go to the police station where the [fol. 4]. instant complaint was sworn out and the warrant was issued for his arrest. There is no question of intimidation, excessive force or lack of courtesy on the part of the police before, during or after the meeting. The contrary is admitted.

When the trial was about to commence defendant, with permission of the superior court, made a motion to quash, orally and in writing, on the grounds that the ordinance on its face and as construed and applied is unconstitutional in that it abridges the rights of defendant to freedom of speech, freedom of assembly and freedom of worship, contrary to the provisions of the first and fourteenth amendments to the constitution of the United States and to the provisions of sections 3, 10, and 21 of article I of the constitution of Rhode Island. This motion was denied and is the subject of defendant's first exception.

The defendant concedes in his brief and argument that such motion is based on the identical grounds and raises the same constitutional questions as those involved in the certification which was decided by this court in *State v. Fowler, supra.* However, he insists that in such opinion we have misconceived the applicable law and have failed to follow the mandate laid down by the United States supreme court in many cases which he again cites; and that we have erroneously relied upon the *Davis* case which is either not the law or not in point. Especially he now em-

phasizes the cases of *Jamison v. Texas*, 318 U. S. 413, *Commonwealth v. Gilfedder*, 321 Mass. 335, to show the earlier case of *Davis v. Massachusetts*, *supra*, is longer the applicable law of the United States in the cumstances here.

In view of the strong argument on this point we have examined the many cited cases but we fail to find whe [fol. 5] any of them lays down an express mandate req ing a different conclusion from the one which we reac and expressed previously on the basis of the pertinent unanimously enunciated by the United States supre court in the *Davis* case. In our judgment that case c cerned an ordinance which in substance and effect is si lar in principle and purpose to the one involved in the stant case. It was part of a general ordinance designed control and regulate a common or park which was ow by the state or city and was maintained for the general c venience and comfortable use of the public as a wh Likewise as part of the regulation it permitted in practi effect what amounted to a prohibition of all religious a political addresses to assemblies in that public common park, much as we have expressly in the ordinance un consideration herein.

Consequently the *Davis* case is clearly distinguisha from *Jamison v. Texas*, *supra*, which is relied on by defe ant. There, among other provisions, the ordinance ma it unlawful "to scatter or throw any handbills, circula cards, newspapers or any advertising device of any descr tion, along or upon any street or sidewalk in the city Dallas." Nothing in that ordinance purported to make unlawful *to distribute* religious pamphlets, and yet t gravamen of the complaint there, as viewed from the e dence, was directed *solely* to the defendant's *distributi* of religious treatises which had on the back a reference a book which could be purchased if desired. Therefore the face of the ordinance and on the facts that case is d ferent from the *Davis* case.

Moreover the ordinance in *Jamison v. Texas*, *supr* differs still further from the one in the instant case in th the ordinance here expressly recognizes the right of r ligious groups to assemble and nowhere makes it unla [fol. 6] ful to distribute religious pamphlets or to ho

religious meetings and services. Therefore the *Jamison* case does not appear to us to carry any mandate, express or implied, that is applicable to the ordinance and facts of either the *Davis* case or the one now before this court.

It will serve no useful purpose to repeat what was said previously in our opinion on the certification concerning the numerous cases relied on by defendant, except perhaps to observe that we find it difficult to determine precisely which of the principles of law as stated in certain of the main opinions are actually concurred in by a majority of the justices of the United States supreme court. Likewise in those cases it becomes hard to know, in view of language in the several concurring and dissenting opinions, to what extent some statements of law in the main opinions may have been restricted or inferentially overuled in later cases.

We may again point out, however, that in the *Davis* case the supreme judicial court of Massachusetts unanimously and unequivocally stated the law applicable to the right of an individual member of the public to use a park or common that is maintained and regulated by the state or municipality for use by the public as a whole, and that such statement of the law was expressly approved and incorporated as part of the opinion of the United States supreme court in *Davis v. Massachusetts, supra.*

Further the supreme court of the United States added thereto the following statement of the law which was unanimously concurred in: "It is, therefore, conclusively determined there was no right in the plaintiff in error to use the common *except in such mode and subject to such regulations as the legislature in its wisdom may have deemed* [fol. 7] *proper to prescribe.* The Fourteenth Amendment to the Constitution of the United States does not destroy the power of the States to enact police regulations as to the subjects within their control * * * *and does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the constitution and laws of the State.*" (italics ours)

That case, though frequently cited to the supreme court of the United States, has not been expressly overruled by that court. On the contrary it has been distinguished in some form from cases in which it was cited. Ordinarily a court does not distinguish one of its own cases if it really

intends to overrule it and to hold that such case no longer states properly the applicable law of that jurisdiction. Moreover it is reasonable to expect that if and when the United States supreme court actually intends to overrule the express statements of law in the *Davis* case, it will reserve to itself the right to do so in equally unmistakable language for the guidance of other courts which must conform to that court's decisions.

But the defendant nevertheless argues that the *Davis* case has been nullified and in effect overruled by implications to be gathered from statements in certain of the cases decided by the United States supreme court and discussed in our former opinion. He urges that the decision of the supreme judicial court of Massachusetts in the case of *Commonwealth v. Gilfeder, supra,* shows a proper conception of the effect of those decisions and states the law presently governing cases of this kind. Apparently the Massachusetts court in that case did not adhere to the law previously stated by it in the *Davis* case, which had unanimous approval by the United States supreme court.

[fol. 8] It is significant, however, that the Massachusetts court did not overrule its own decision in the *Davis* case and expressly conceded that it could not find a case where the supreme court of the United States had overruled its approval of that case. Furthermore it may be noted that the supreme judicial court of Massachusetts appears to have applied elsewhere, with reference to a certain decision of the United States supreme court, the principle that any change by way of extension in the ruling of the case then under consideration "must come from the court which first pronounced that doctrine." *Sherrer v. Sherrer,* 320 Mass. 351, 359. We agree with that pronouncement. By analogy here, if the explicit ruling of law in *Davis v. Commonwealth,* 167 U. S. 43, is to be overruled, it should come only from the United States supreme court.

At any rate the difficulty which we have with the procedure indicated by that opinion is twofold. We are bound to follow the supreme court of the United States in its decisions relating to the law governing the United States constitution. But we are not bound necessarily by another state court's interpretation of or implications from the decisions of the United States supreme court. Secondly,

we cannot believe it to be a sound constitutional principle to leave the law applicable to the United States constitution to broad implications drawn generally by state courts from opinions of the United States supreme court. Conceivably on such a basis there could be forty-eight different deductions or inferences as to what each state court thought a decision of the United States supreme court really meant and as to the limitation, if any, on the exercise of such a constitutional right which, according to a particular state court's deduction, had the concurrence of a majority of the [fol. 9] United States supreme court. In our judgment that is not a desirable or helpful substitute for an authoritative and objective guide which the state courts are expected to follow in such important determinations.

On the other hand, if such a practice were to be adopted, then even if all state courts were in agreement on a particular conclusion deduced inferentially from language in certain opinions of the United States supreme court, the latter, which alone has the sole prerogative of determining questions relating to the United States constitution, might well say that a majority of that court had never overruled the *Davis* case; that such case had always been distinguished without intending to overrule it; and that it still is applicable law in the type of case where the question involves only the defendant's right, as a member of the public, to speak in a manner and under conditions which would violate the equal and correlative rights of other members of the public to a reasonable use of the park for its dedicated purpose. In our judgment, for all that appears in the cases thus referred to by the defendant and discussed in our previous opinion, there is nothing which would prevent such conclusions by the United States supreme court.

In that connection it is interesting to note the case of *Commonwealth of Pensylvania v. Geuss*, 168 Pa. St. 22, which was affirmed by the supreme court of Pennsylvania in 368 Pa. 290, and in which certiorari was denied by the United States supreme court since the argument herein. *Geuss v. Pennsylvania*, 342 U. S. 912. There the supreme court apparently did not feel constrained to interpret in the manner urged by defendant here the statements of principles appearing in certain opinions of the United States supreme court. The Pennsylvania supreme court did not

read such opinions as compelling a conclusion that an ordi-
[fol. 10] nance must be invalid if, as part of a reasonable regulation, it purports to prohibit an individual from exercising a constitutional right of freedom of speech in a public place. While that case involved an ordinance prohibiting the use of sound trucks on public highways, whereas here we have the use of two "loud speakers" in a small public park in a residential section of the city, yet the underlying principle of prohibiting a constitutional right as part of a reasonable regulation in the public interest is analogous to the regulation in the ordinance as construed and applied in the instant case.

Further, defendant's claim leads to discrimination. It would create in him, as one member of the public, a paramount right whereby he may insist not only that the park be maintained at public expense as a forum for the exercise of his constitutional right but also that he may exercise such right with the aid of sound-magnifying equipment so as necessarily to abridge or destroy the equal and correlative rights of others. Granting his constitutional right to freedom of speech, others also have an equal constitutional right not to be compelled to listen and not to be forced to attend a religious meeting and, as members of the public generally, not to have another person destroy their rights to use the park for its dedicated purposes of rest and recreation. We think that the unequivocal statement of the law as it appears in the *Davis* case is sound, reasonably protects the rights of defendant and others, and should be applied here. In our opinion defendant's right is not paramount to the rights of all others and its exercise is not to be indulged without reasonable limitation. Such a right ceases
[fol. 11] to be employed in a reasonable manner when in the nature of things its exercise, as here, is bound to abridge or destroy the equal constitutional rights of other members of the public.

At any rate in the circumstances we fail to find wherein the applicable constitutional law of the United States has been stated so clearly that it amounts to a mandate, as urged by defendant, or that would constrain us to reach a result different from that which we expressed in our previous opinion when the case was before us on the certified questions. *State v. Fowler, supra.* On the contrary we

prefer to apply the recognized rule which prohibits a state court from striking down a legislative enactment unless it appears beyond a reasonable doubt that it violates a particular provision of the constitution of the United States or of this state. So long as the unequivocal statement of law by the supreme court of the United States in the *Davis* case is left standing without a reasonably equivalent statement modifying or overruling it, we find it impossible to say beyond a reasonable doubt that the nondiscriminatory and realistically regulatory ordinance in the instant case is unconstitutional for the reasons asserted by the defendant. The defendant's first exception is therefore overruled.

The motion to dismiss, which is the subject of defendant's second exception, has no place in our practice and for that reason could be overruled. However, it admittedly involves the same essential question of law which has been discussed and decided in our previous opinion and also herein under the plaintiff's first exception. Likewise the defendant relies on the identical question under his fourth exception, [fols. 12-13] because there is no dispute as to the evidence that the defendant is guilty if the ordinance is valid. These exceptions are therefore overruled.

For the reasons stated, all of the defendant's exceptions are overruled, the decision and conviction are affirmed, and the case is remitted to the superior court for further proceedings.

BAKER, J., dissenting:

I am unable to agree with the opinion of the majority of the court. This is the same case which was recently before us on certified constitutional questions of doubt and importance. See *State v. Fowler*, R. I., 83 A. 2d 67. The case is now here after a trial in the superior court.

In my dissent from the opinion filed in the previous case I set out reasons for my view of the section of the ordinance in question. I am still of the opinion that section 11 of chapter 149 of the ordinances of the city of Pawtucket enacted August 17, 1916 is unconstitutional as being contrary to the pertinent provisions of the first and fourteenth amendments to the constitution of the United States. It is unnecessary to restate such reasons as they can be readily

ascertained from an examination of the above-mentioned dissent. In the circumstances I am of the opinion that the defendant should be adjudged not guilty and should be discharged.

Capotosto, J., concurs in the dissenting opinion of Mr. Justice Baker.

[fol. 14] In Superior Court of State of Rhode Island

C.A. No. 31196

State of Rhode Island

vs.

William B. Fowler

Defendant's Bill of Exceptions

Now comes the defendant and files this his bill of exceptions as follows:

(1) An exception to the ruling of the trial court denying defendant's motion to quash the complaint in the instant case, exception to said action appearing on Page 5 of the Transcript.

(2) An exception to the ruling of the trial court denying defendant's motion to dismiss the complaint, exception to said action appearing on Page 21 of the Transcript.

(3) An exception to the ruling of the trial court rejecting defendant's offer of proof appearing on Page 29 of the Transcript, exception thereto appearing on Page 30 of the Transcript.

(4) An exception to the decision of the trial court finding the defendant guilty, exception appearing on Page 57 of the Transcript.

Wherefore, within the time limited by court in defendant's notice of intention to file a bill of exceptions, the [fols. 15-16] defendant files this his bill of exceptions and prays for its allowance pursuant to law.

By his Attorneys, Hayden C. Covington, Aram A. Arabian.

[fols. 17-18] IN SUPERIOR COURT OF STATE OF RHODE ISLAND

[Title omitted]

Transcript of Testimony

Heard before: Mr. Justice Andrews on October 22, 1951.

Jury Trial Waived

APPEARANCES:

Raymond J. Pettine, State Special Counsel for the Prosecution.

Hayden C. Covington and Aram A. Arabian for the Defendant.

Vincent A. Walsh, Court Stenographer.

[fol. 19] Mr. Pettine: If Your Honor please, the State is now ready in the case of State vs. William B. Fowler. I am asking at this time that the defendant be arraigned.

Mr. Arabian: Before the defendant is arraigned, Your Honor, in prior proceedings in this same case the defendant had been given leave to withdraw his plea of not guilty for the purpose of arguing a motion to quash the complaint and before he is required to plead I would ask that that motion be renewed at this time and for that purpose it gives me pleasure to introduce to Your Honor, Hayden C. Covington, Esquire, a member of the New York and Texas bars, who will argue the motion and, with Your Honor's permission, carry on the trial of this case.

The Court: I will admit you to our practice for the purpose of this case and the clerk will note it. Do you make that motion now?

Mr. Covington: I make a formal motion for the sake of the record.

The Court: Has anybody got an extra copy of the Supreme Court opinion?

[fol. 20] Mr. Covington: I have that right here, Your Honor.

The Court: Have you got one left?

DEFENDANT'S MOTION TO QUASH COMPLAINT AND DENIAL THEREOF

Mr. Covington: We had one each. May it please the Court, now comes the defendant before arraignment, and leave of court having been granted to withdraw a plea of not guilty, I make this motion to quash, which we could ask to be later reduced to writing, that we make now for the sake of the record. We say that the complaint ought to be quashed in this case because Section 11 of Chapter 149 of the ordinances of the City of Pawtucket, approved April 17, 1916, is on its face and as construed and applied unconstitutional because it abridges the rights of freedom of speech, freedom of assembly, and freedom of worship, contrary to the first and fourteenth amendments of the United States constitution and Sections 3, 10, and 21 of Article I of the constitution of the State of Rhode Island. Wherefore the reasons stated the defendant moves that the complaint be quashed and the prosecution dismissed. We will reduce that in writing, Your Honor, and file it among the papers. We are ready now to have a ruling, if the Court wants to [fol. 21] rule, and then enter a plea. No argument will be made because the entire matter is covered in the opinion of the Supreme Court which is in possession of Your Honor.

The Court: As I understand this opinion, our Supreme Court has ruled adversely to your contention.

Mr. Covington: That's correct, Your Honor.

The Court: I am governed by our Supreme Court. I will deny the motion and note your exception.

(Defendant's exception noted.)

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Covington: All right, Your Honor. We are ready now to arraign the defendant. Mr. Fowler, will you step up? We will waive the reading of the complaint, Your Honor, and enter a plea of not guilty for the defendant.

Mr. Pettine: Now, if Your Honor please, for the sake of the record I would like to have the defendant state whether or not he waives jury trial in this matter.

[fol. 22] Mr. Covington: Yes, we will. I will say this, that I have discussed the matter of jury trial with Mr. Fow-

ler and informed him fully as to his constitutional right of trial by jury under the constitution of the State of Rhode Island and also the constitution of the United States and I have advised him that we waive the right of trial by jury and he consents to it, may it please the Court.

The Court: I don't doubt but he knows what he is doing. As I understand from the conference we had, you are having this trial to get a record.

Mr. Covington: That's right.

The Court: Have it reviewed by the Supreme Court of the United States.

Mr. Covington: That's right, sir.

The Court: And the result of this trial is more or less a foregone conclusion.

Mr. Covington: That is correct, Your Honor.

The Court: Do you want him to sign a written waiver?

Mr. Covington: I don't think it is necessary to sign it, Your Honor.

[fol. 23] The Court: It is a matter of record.

Mr. Pettine: I think if he makes a personal statement.

The Court: You formally waive the right to a jury trial?

Mr. Fowler: (The defendant) Very gladly, sir.

Mr. Pettine: The State is ready to proceed, Your Honor.

Mr. Covington: We are ready, Your Honor.

Mr. Pettine: If the Court please, this complaint and warrant was made and issued against the defendant, William B. Fowler, on September 3, 1950, which complaint reads that: "on the 3rd day of September A. D. 1950, with force and arms, William B. Fowler, alias John Doe, did violate Section 11 of Chapter 149 of the ordinances of the City of Pawtucket in that he did address a religious meeting in a public park, to wit, Slater Park." For the sake of the record, if the Court please, on October 14, 1950, the defendant in the District Court of the Tenth Judicial District was [fol. 24] adjudged guilty and there he was sentenced to pay a fine of $5.00 and costs. And on that date he duly appealed the sentence to the Superior Court in the County of Providence & Bristol.

On January 15, 1951, the matter was called for hearing and by a leave of the Court the defendant made a motion to dismiss and the question then was certified to the Rhode Island Supreme Court by the late Mr. Justice Walsh.

It is now before Your Honor for a hearing on the facts.

I have here a certified copy of Chapter 149, an ordinance providing rules and regulations for public parks in the City of Pawtucket, in its entirety, including Section 11, the specific section involved, and by agreement of opposing counsel, Mr. Covington and Mr. Arabian, I introduce it in evidence as State's Exhibit either 1 or A as Your Honor wishes to mark it.

The Court: That was in force at the time of this occurrence?

Mr. Covington: Yes, Your Honor, and it also covers and [fol. 25] governs the park where this incident took place on September 3rd, 1950.

Mr. Pettine: And as my brother stated, that was the ordinance in force at the time of this alleged offence.

Further, it is stipulated between Mr. Covington, Mr. Arabian and myself that it is a fact that Slater Park is a public park in the City of Pawtucket.

Mr. Covington: That is correct, Your Honor.

Mr. Pettine: And it is further stipulated that Slater Park does have an area of approximately 194 acres; that within the above area are located tennis courts, Merry-go-round, bandstand, a lake with rental boats, a baseball field, swings and dandles for children, sixteen fireplaces, animal and bird compounds, extensive formal gardens, natural woodlands, and improved roads. Am I correct?

Mr. Covington: This is correct. And also may we add to that that there is space in the park for assemblies of these kinds and that assemblies can be held without interfering with these other activities.

[fol. 26] Mr. Pettine: I will stipulate there is sufficient space in the park, if you wish that. I will go that far.

Mr. Covington: All right.

Mr. Pettine: Now, if Your Honor please, as to what actually took place on this particular day, the facts substantiating the charge, I call to the witness stand Chief Honrigan of the Pawtucket Police.

VINCENT A. HOURIGAN, sworn.

Direct examination.

By Mr. Pettine:

1 Q. Now, Chief Hourigan, you are a member of the Pawtucket Police Department; is that correct?

A. I am.

2 Q. And I call your attention to the date in question of September 3rd, 1950, and ask you if you were a member of the police department on that date?

A. I was.

3 Q. And on that date, Chief, did you have occasion to go to a Slater Park so-called?

A. I did.

[fol. 27] 4 Q. And what time did you get there?

A. At approximately 4:12.

5 Q. And would you please state to the Court where Slater Park is?

A. Slater Park is in the extreme east end of our city.

6 Q. When you say "our city," you mean the——

A. City of Pawtucket.

7 Q. In the State of Rhode Island?

A. That's right.

8 Q. I also ask you whether or not this is a public park?

A. It is.

9 Q. Now, when you got there on this particular day, strike that.

10 Q. Did you state what year that was, Chief?

A. No, I did not. September 3rd, 1950.

Mr. Pettine: 1950.

11 Q. Now, will you state to the Court what you saw when you arrived at the park on that day?

A. Yes, in a large field when I arrived with a number of other police, Mr. Fowler was addressing a gathering of about 400 people.

[fol. 28] 12 Q. Now, I'd like you to stop here, Chief. Mr. Fowler, you say; is he in the courtroom now?

A. Yes, sir, he is.

Mr. Covington: We will stipulate that that is the fact in the case.

Mr. Pettine: You will stipulate that he is the defendant in the case. All right.

13 Q. Will you proceed, Chief?

A. Mr. Fowler was standing in front of a rostrum. There was a microphone at the rostrum and it was connected with two loud speakers, one on either side of him, probably 15 feet to each side of him. On the rostrum was an 8 1/2 by 11 inch looseleaf page book and a bible. He was addressing the gathering and not reading from the script, but looking directly to the people in front of him. The nature of his talk was comparing the present day status of this country with Babylon before its destruction some two thousand years ago. I heard him say something to the effect how futile it was to attempt to obtain peace in the manner they were attempting to obtain it today instead of appealing to the Dove of Peace, Jehovah. About that time I approached him.

[fol. 29] 14 Q. Now, you said, as I understand it, that there were about 400 people?

A. That's approximately, yes.

15 Q. In your opinion, more or less?

A. Yes, sir.

16 Q. And that the Defendant Fowler was addressing these people?

A. That's right.

17 Q. Had a rostrum?

A. Had a rostrum.

18 Q. Had two loud speakers?

A. That's right.

19 Q. These loud speakers or these microphones were working?

A. They were, yes.

20 Q. Now, I think we better have it for the record, he is in the courtroom today?

A. William B. Fowler, that's the man sitting in the seat on the left of Captain Burns.

The Court: B or P?

The Witness: Fowler.

The Court. What is his middle initial?

The Clerk: B.
The Witness: B.

[fol. 30] 21 Q. Now, did you then approach Mr. Fowler?
A. I did.
22 Q. And where did you approach him?
A. At his rostrum.
23 Q. Right there in the park?
A. At his rostrum in the park.
24 Q. What did you do then?
A. I asked him if he had permission to speak at the park and he told me that he didn't need permission. I told him then that I was placing him under arrest for violating a city ordinance. He appeared as though he expected the arrest and he said, "All right."
25 Q. It is not what appeared, Chief, but what actually took place. Now, did he make any statements to you, Chief, with reference to his talk?
A. He did. We brought him to the police station and in my office in the police station he said that he has been a member of Jehovah Witnesses for about 40 years and he has been doing public speaking for them for 38 years; that he was assigned as the speaker of the day for the Pawtucket company of the Jehovah Witnesses and that he prepared his talk of that day on the basis of a speech given by President Truman to the nation on September 1st, and [fol. 31] from scriptures from the St. James translation of the Bible.
26 Q. Now, Chief, did he make any statements——

The Court: —I suppose you mean King James.
The Witness: No, I think he said St. James.

27 Q. Chief, did he make any statement to you as to who these people were, these 400 people?
A. Yes, he did. He said that—he estimated that about 150 were Jehovah Witnesses and the other 250 were there but not Jehovah Witnesses.
28 Q. Did he state whether or not this was a religious meeting?
A. Yes, it was a meeting of the Jehovash Witnesses, yes.

Mr. Pettine: I see.

29 Q. Now,——

Mr. Covington: We'll stipulate to that effect.

Mr. Pettine: You will. Then for the record, Mr. Covington and Mr. Arabian stipulate that this meeting testified to [fol. 32] by Chief Hourigan was, in fact, a religious meeting and that Mr. Fowler did, in fact, address them; is that correct?

Mr. Covington: Yes.

29 Q. (Question continued) Now, was anything further stated?

A. Other than he told me he was an ordained minister of the Jehovah Witnesses. There was much other talk in the office.

30 Q. And were they a peaceful group, Chief?

A. Yes, they were a peaceful group.

31 Q. They were a peaceful group?

A. They were.

32 Q. And it was a peaceful gathering?

A. It was.

Mr. Pettine: You may inquire.

Cross-examination.

By Mr. Covington:

33 Q. Mr. Hourigan, on that subject, there was no disturbance or annoyance to any of the other users of the park, were there, by this speech; he wasn't using obscene or any foul language or attacking any o e, was he, in his speech?

A. There was certainly no obscene or foul language. I didn't hear him attack any one.

[fol. 33] Mr. Covington: All right, sir.

34 Q. And there was no threats of a breach of peace or anything like that, was there?

A. Would you explain that a little more?

35 Q. There was no threat of a breach of the peace, was there?

A. No.

36 Q. Either by him or by any member of the audience?

A. No.

37 Q. Except for his failure to have legal authority to be in the park to make this speech and hold the assembly, it was a lawful and peaceful assembly, was it not?

A. Yes, it was.

The Court: Do I understand, gentlemen, that you can get a license to do what this man did? I notice that the Chief said he asked him if he had a license.

The Witness: No, I said I asked him if he had permission.

The Court: Well, it is the same thing as far as I am concerned.

Mr. Covington: We might say this, we understand that [fol. 34] permission was given on two previous occasions for the holding of this.

The Court: Is there anything in the law that provides for permission to do what he has done?

Mr. Covington: As far as I know, I know of no such permission.

The Court: That ought to be cleared up because it might be well to know when you get upstairs.

Mr. Covington: That's right, but as far as I know there is no law authorizing it but permission was granted on two previous occasions.

The Court: I didn't understand that there was any provision, but in view of the fact that the Chief asked him if he had a permit.

The Witness: That was more or less a figure of speech. I realized when I went there that he could not talk even with a permit. However, there was a little tense feeling as we approached the gathering.

By Mr. Covington:

38 Q. Mr. Fowler was, of course, courteous and polite, I suppose, in all of his dealings?

A. Very much so.

[fol. 35] 39 Q. At the time you got there until you left?

A. He was.

40 Q. Of course—of course, you had had previous dealings with Jehovash Witnesses in respect to the use of the park, had you not, Chief?

A. Did I have? For the two prior weeks, two previous weeks.

41 Q. Previous occasions you found them using the park and ordered them not to use it?

A. On the Sunday prior, yes, on August 28th I stopped them from—stopped them.

Mr. Covington: I believe that's all.

Redirect examination.

By Mr. Pettine:

Mr. Pettine: Just one further question, Chief.

42 Q. You didn't in any way prohibit these people from visiting the park though, did you?

A. No, I did not. It was just from holding a religious meeting.

Mr. Covington: We do not contend that these people entered the park for visiting it or seeing the beauties of [fol. 36] its surroundings, but we stipulate that they went in there for the purpose of holding a lawful and peaceable assembly, and for the purpose of him making an address to this religious gathering.

Mr. Pettine: That's all, Chief.

Mr. Covington: May it please the Court, I am going to state for the sake of the record some facts and it may be that they will be stipulated and save me from having to call three witnesses. I know they are undisputed and if there is any disagreement to them you can so specify and I will have to put on Mr. Fowler as one witness.

We propose for stipulation that on two—three or four weeks before this incident took place on September 3rd, the local congregation of Jehovah's Witnesses——

Mr. Pettine: I am sorry. I don't mean to interrupt, but for the record the State rests after Mr. Hourigan.

The Court: You are making an offer of proof now on what you would prove?

Mr. Covington: I am going to state what I will prove and maybe he will stipulate.

[fol. 37] The Court: Well, of course, you can either put it on—I can say it's no defense or reject your offer as not material.

DEFENDANT'S MOTION TO DISMISS COMPLAINT AND DENIAL THEREOF

Mr. Covington: Probably it will be better to call my witnesses.

I make a formal motion at the conclusion of the State's case and move for dismissal of the complaint because the State has wholly failed to prove any offence and also for the further reason that Section 11 of Chapter 149 of the ordinances of the Ci. of Pawtucket, approved April 17, 1916, on its face and as construed and applied is unconstitutional because it abridges the rights of freedom of speech, freedom of assembly, and freedom of worship, contrary to the first and fourteenth amendments to the Constitution of the United States and Article I of the Constitution of the State of Rhode Island, particularly Sections 3, 10, and 21. That's the formal motion.

The Court: I deny it.

Mr. Covington: All right. Exception.

(Defendant's exception noted.)

Mr. Covington: Now, Mr. Planka, would you please take the stand?

[fol. 38] EDWARD PLANKA, sworn.

Direct examination:

By Mr. Covington:

1 Q. You are one of Jehovah's Witnesses, sir?

A. That's right.

2 Q. You are a minister of the gospel?

A. That's right.

3 Q. And you are associated with the Pawtucket company—congregation of Jehovah's Witnesses known as the Pawtucket Company of Jehovah's Witnesses; is that correct?

A. Right.

4 Q. Now,—rather, before September 3rd, 1950, did you have occasion to deal with the Superintendent of Parks of the City of Pawtucket in reference to an attempt on the part

of Jehovah's Witnesses to get permission to use Slater Park?

A. I did.

5 Q. Please tell about that, who was with you and what occurred?

A. Well, it was in the middle of June, 1950 that Mr. Desroches, sitting right there——

6 Q. Spell his name.

A. D-e-s-r-o-c-h-e-s.

[fol. 39] Mr. Covington: All right.

The Witness: Him and I approached Mr. Corrente. I understand he is the park superintendent of Slater Park.

Mr. Pettine: Your Honor, just for the sake of the record, I feel that I must object on the grounds of materiality.

The Court: Well, I can't see how it is material in view of what the Supreme Court said, but, however, we can't be sure. Perhaps it might be wise to take it. Of course, it isn't the time to object in the middle of an answer.

Mr. Covington: I offer this purely to give the background to the transaction that occurred on the 3rd that's involved here.

The Court: Well, if it is admittedly a religious meeting what more is to be said? I mean legally from a lawyer's point of view.

Mr. Covington: Your Honor, technically speaking, I can see that if we are going to cut it right down to the narrow issue of whether or not the law is valid as construed and applied we can begin with the meeting right there [fol. 40] in the park, but out of the desire to show the entire transaction, lack of wilfullness to violate the law on the part of the defendant and his bona fideness, I am giving the background for that limited purpose, Your Honor.

The Court: I don't imagine that wilfullness is any part of this trial.

Mr. Covington: That is true. I agree with you on that.

The Court: Of course, I don't want to cut off anybody to have a right to review any decision I make or anybody else's. It doesn't seem to me material. I can't sustain the objection in the middle of an answer. It isn't the right

time to make an objection in the middle of an answer. You can finish the answer.

Mr. Pettine: I move to strike it.

Mr. Covington: Would you please finish now about your visit to the Superintendent of Parks?

The Witness: Well, I was asked by Mr. Fornier, the then acting presiding minister of Jehovah's Witnesses in Pawtucket, to see Mr. Corrente about a series of Bible talks [fol. 41] to be held August 20th and 27th. So on that particular day, it was a week day I remember correctly, Mr. Desroches and I went and approached Mr. Corrente and had a discussion with him concerning these talks. We asked directly for permission to have these particular talks at Slater Park. So, Mr. Corrente said, "Why don't you wait until after Labor Day," he said, "you can even have the bandstand."

Mr. Pettine: Well, I object to that. I don't like to object——

The Court: —He is answering.

Mr. Pettine: I have got to adhere to the rules of evidence, Your Honor.

The Court: I know. But you have to adhere to the rules of trial. The question was not objected to. You are objecting in the middle of an answer and all of the answer up to date is responsive. I don't think it makes much difference.

Mr. Pettine: He is telling what Mr. Corrente said.

The Court: I think probably that ought to be eliminated because the question did not call for hearsay, what Mr. Corrente said.

Mr. Covington: Well, Your Honor, in dealing with an [fol. 42] official in reference to the matter you can't very well have dealings without talking and the official is a representative of the City of Pawtucket, a representative of the State of Rhode Island and, therefore, I think there is an exception to the hearsay rule and the hearsay objection is not good. That is my position, Your Honor.

The Court: I will overrule the State's objection. You may proceed.

By Mr. Covington:

7 Q. Go ahead.

A. Well, he gave us permission. We mentioned we wanted two dates, that's August 20th and 27th.

8 Q. All right.

A. And he gave us permission and he also said, "You could even have that spot where the other minister gave a talk a year ago." So, he did give us permission.

9 Q. Where was that spot?

Mr. Pettine: Now, wait a minute. I move that part of it be stricken. It's hearsay as to another minister and what Mr. Corrente said.

The Court: Well, I will overrule your objection. They want to get in the background.

10 Q. Where is the spot?

[fol. 43] A. The spot was not far from Mr. Corrente's home.

11 Q. Is it the spot that was used by Mr. Fowler on the occasion of his arrest September 3rd, 1950?

A. No.

Mr. Covington: No, all right.

The Witness: So, he gave us permission. And I asked Mr. Corrente, "Would you please give me something written out to that effect," and he says, "Well, I'll send it down to your office, or your meeting place," which is 21 Roosevelt Avenue, Pawtucket. We waited for awhile and there was no letter sent to that place. So, again I took Mr. Desroches and went into the City Hall where the Park Commissioner's office was and there was a girl,—lady rather.

Mr. Pettine: If Your Honor please, may I put my objection this way: I think it should be question and answer and not a dissertation on the part of this witness.

The Court: The original question was not objected to and it called for a long narrative and that's what you are getting. I realize that it is hard to object to a long narrative. That's why you should have probably objected to the original question. I think you could ask questions [fol. 44] more profitably. Are you willing to take it up in piecemeal?

Mr. Covington: Yes.

12 Q. Did you have a visit with the commissioner of parks in the City of Pawtucket later; did you or did you not, answer yes or no?

A. Yes.

13 Q. All right. Now, when you went to his office, did you talk to any one there in his office about the use of Slater Park?

A. I did.

Mr. Pettine: I object as not being specific as to what date.

14 Q. Before September 3rd, 1950?

A. I did.

Mr. Covington: All right.

Mr. Pettine: Then, I object to that as being immaterial.

The Court: Before?

Mr. Pettine: Yes.

The Court: I think it is all immaterial myself, but still they want to get it on the record. I don't see that it makes a difference. It is agreed that there is no law giving him—or ordinance or anything—that allows permission to be [fol. 45] given.

Mr. Covington: I am just trying to give the background of the transaction because it was all tied in with conversations that occurred later between the Chief and——

The Court: Does that constitute a defense?

Mr. Covington: It does not.

The Court: I will reject your offer. We might as well cut this down.

Mr. Covington: Let me make an offer of proof.

The Court: Make an offer.

OFFER OF PROOF

Mr. Covington: I make an offer of proof if this witness were permitted to testify he would show that applications were made orally to the Superintendent of Parks as well as to the Commissioner of Parks in the City of Pawtucket in behalf of Jehovah's Witnesses, and permission was actually granted for the holding of meetings on August 20th and August 27th, 1950; and that at sometime subsequent to that the congregation of Jehovah's Witnesses were notified by Chief Hourigan that the law of Pawtucket did

not authorize the use of the park by granting of permits, [fol. 46] and that no religious meetings or assemblies of this kind could be held in the park, and then that notice was given before September 3rd, 1950, on the date that this transaction occurred in Slater Park in the City of Pawtucket.

The Court: You object to that?

Mr. Pettine: Yes, sir, I object.

The Court: Any part of it material, do you claim that statement is defense to this?

Mr. Covington: That statement is just my offer of proof in connection with the exception taken.

The Court: I will reject the offer and give you an exception.

Mr. Covington: All right. That's all. You may step down.

(Defendant's Exception Noted.)

William B. Fowler, sworn.

Direct examination.

By Mr. Covington:

1 Q. Please state your address, sir?

A. I live at 70 Appleton Street, Arlington, Massachusetts. [fol. 47] 2 Q. How long have you lived in the State of Massachusetts?

A. Well, I have lived in Massachusetts now for—let's see—sixty, no, 57 years, 58 years.

3 Q. Where were you born?

A. I was born in New Brunswick. My father moved to this country when I was a mere lad and I have grown up and received my education in the schools of America, United States.

4 Q. And you are a minister, are you, sir?

A. I am a minister, an ordained minister of the gospel, scripturally ordained and I am acting under the direct—the immediate direction of the Watch Tower Bible Society which is the governing body of Jehovah's Witnesses, located at Brooklyn, New York.

5 Q. Are you associated with a congregation of Jehovah's Witnesses?

A. I am, sir, the Cambridge Company of Jehovah's Witnesses, Cambridge, Massachusetts.

6 Q. And did you have occasion to be invited to give a talk as a visiting minister to an assembly in Slater Park here in Pawtucket, Rhode Island, in the year 1950?

A. I did.

[fol. 48] 7 Q. You gave two such talks, did you not?

A. I attempted to.

8 Q. Now, then, when was your first attempt?

Mr. Pettine: I object.

The Court: Well?

Mr. Pettine: Unless it pertains to the question, Your Honor.

Mr. Covington: It is again preliminary, and if we cut it right down to the bone—it could be done legally—but still I think some background ought to be permitted, Your Honor. I will let the matter go.

9 Q. You attempted to give a talk in Slater Park on the 27th of August.

A. I did.

The Court: Is that the date?

Mr. Covington: That is not the date in question.

10 Q. Now, then, following that date, did you respond to a subsequent invitation to give another talk in Slater Park?

A. I did.

11 Q. And what was the date for that?

[fol. 49] A. That was September 3rd, 1950.

12 Q. Now, then, was that in Slater Park?

A. It was.

13 Q. And you agreed to come down to give the talk as a visiting minister to accommodate the Pawtucket congregation of Jehovah's witnesses?

A. I did.

14 Q. Now, what time did you arrive?

A. At the park?

Mr. Covington: Yes.

The Witness: About quarter of four, yes, about quarter of four. The lecture was given at four.

15 Q. What time was the talk scheduled to be given?

A. At 4 o'clock but I began speaking about five minutes earlier than that, about five minutes to four.

16 Q. Now, was the place of assembly a suitable place for an assembly?

A. Very much so, very delightful spot.

17 Q. Tell us about where it was in the park?

A. Well, I don't know as I can do that accurately. As you go into the main entrance where that beautiful pond and the flowers are around, it is sort of a circular affair, [fol. 50] keeping to the left of that and bearing up to the right.

18 Q. You pursued on down on the road further in the circle?

A. We followed the automobile path down about I should judge half a mile. Oh, it was well into the park.

19 Q. Well into the park?

A. Yes.

20 Q. Were there trees there?

A. Yes, many trees, lovely green grass, a good place for people to assemble peacefully to hear the word of God.

Mr. Pettine: I object.

The Court: I will strike out everything after "yes."

21 Q. Now, describe the spot where the assembly gathered?

Mr. Pettine: I object. I don't see the materiality of that either.

Mr. Covington: I am quite sure I can say that that is material, Your Honor, because the purpose of this testimony is to show that it was a proper and suitable spot for the holding of an assembly and to show that it was not in some improper spot in the park and it certainly is part of the res gestae.

[fol. 51] The Court: Any claim of the State that this wasn't a good place for it? I thought that was brought out originally. It is a very fine place for assembly. I thought the Chief said that it was a good place for people to get together. Is there any dispute about it?

Mr. Pettine: We just brought out in the record that it is a public park consisting of 194 acres.

The Court: I will allow it. I will allow the defendant to show that it is a place suitable for people to hear a public address.

Mr. Covington: All right.

By Mr. Covington:

22 Q. Now, will you please describe, having in mind the trees and the grass and the surroundings in the park, and let us know where that was, what part of the park, and describe it?

A. Well, as I have previously stated, it was on the right side of the automobile road that led up into that direction beyond the entrance. About half a mile, I should say, from the entrance. And there were no other gatherings anywhere around that I could see or hear. It was quiet and the crowd had assembled there to hear this lecture that had [fol. 52] been very thoroughly advertised.

23 Q. Now, you—well, tell us, please, whether there—did the assembly take place in the neighborhood where the trees were; was it out in the open sunshine?

A. The rostrum and the sound equipment was placed directly under a large tree so that the sun wouldn't shine directly in my face, but it was a lovely spot.

24 Q. How about the spot where the audience was seated?

A. That was an open grass plot and at the rear of that as I faced it there were trees around that day, too.

25. Q. Did the assembly of people there interfere with the use of the park by other persons?

A. Not that I know of. I didn't see any such thing.

The Court: Were they seated on the grass or standing?

The Witness: Some were seated, sir, and most were standing because there were no benches.

Mr. Covington: Most were standing.

The Court: Any signs there to tell you to keep off the grass?

The Witness: No, sir, not that I could recall.

26 Q. Now, you say the speech that you gave—an assembly to be held had been advertised; do you mean to [fol. 53] say that there had been hand bills circulated?

A. Yes, sir.

27 Q. Advertising it?

A. Many hundreds of them had been circulated throughout the entire city and upon the streets by Jehovah's Witnesses.

28 Q. Now, then, what was the nature of the advertising? I have here a ——

A. —Well, the subject of the talk was "The Pathway to Peace."

Mr. Pettine: I object. I don't see the materiality of the nature of the advertising and the contents of these hand bills.

The Court: Well, I don't know that it is material. It seems to me it might help the State. I don't know that it has any legal significance either. I will allow it.

29. Q. All right, then, using this leaflet here to refresh your recollection, tell the Court what time—what type of advertising was made in the City of Pawtucket before September 3rd, 19——

The Court: That is it apparently.

Mr. Covington: No, it is the other, a week previous. It is the same title though, Your Honor.

[fol. 54] The Witness: Well, during the week previous the Witnesses of Jehovah would assemble on the streets with their magazine bags on the street corner and pass out these flyers to the people and tell them about this meeting, inviting them to come.

30 Q. (Showing witness a sheet of paper) Is it not a printed invitation you hold there offering the people the privilege of hearing this lecture in Slater Park, entitled "The Pathway to Peace," to be delivered by you as a representative of the Watch Tower Society?

Mr. Pettine: I object.

The Court: I will allow it.

Mr. Covington: I am trying to save time, Mr. Pettine.

31 Q. Now, tell us how many people were gathered in the park? You heard Chief Hourigan say about 400; is that approximately right?

A. I agree with what Chief Hourigan said. I won't question his estimate respecting that matter.

32 Q. Some were Jehovah's Witnesses and others were strangers?

A. Approximately 150, I should judge, were Jehovah's Witnesses and the balance, 250, were strangers that had come there to hear the lecture.

[fol. 55] 33 Q. All right. Will you please tell us what occurred after the assembly was brought to order?

A. Well, *after the assembly was brought to order I was introduced as the speaker of the occasion and began my speech, "The Pathway to Peace," I was using President Truman's talk as an illustration of the futility of men's efforts to establish peace by themselves. And then I launched forth into the scriptural evidence to show where we were on the string of time; that we had reached the end of this wicked system of things.* I had spoken about, I should judge, five minutes.

Mr. Pettine: Just a moment.

Mr. Covington: Mr. Pettine makes an objection.

Mr. Pettine: I make a move that be stricken as to the contents of this speech. He made a speech. It was a speech and that's the whole sum and substance of it. What the contents of the speech, or to have the speech in this court this morning, I think adds nothing.

(Last question read by the stenographer)

The Court: Of course, everything in the world is in there since then. He is describing what he did. Do you think it is important? I think I will let him finish but don't elab-[fol. 56] orate unduly. Just get across the general picture.

Mr. Covington: May I say this, Your Honor, in response to the objection that Mr. Pettine has made: Chief Hourigan testified extensively as to what was said by the speaker and I think the evidence would be proper by way of rebutting Chief Hourigan's testimony.

The Court: It doesn't rebut anything. It isn't contradicting anything the Chief said. It was perfectly peaceful.

Mr. Pettine: I withdraw the objection.

34 Q. Go ahead and give us briefly what you have said and cover up to the time—from the time you started the talk until Chief Hourigan stopped you.

A. Well, *I had pointed out that it was a natural desire for all men to want peace; that they had desired that for centuries and they made strenuous efforts down through the centuries to obtain peace. They had failed and failed for an exceptionally good reason, too, and that today instead of peace we have fear and war, trouble and distress amongst the people. It was my purpose to point out from thereon the principal reason why they failed and at about* [fol. 57] *that time I was, within the matter of seconds, surrounded by an impregnable wall of police officers.*

35 Q. Well, how many?

A. Well, I should judge there were about eight or ten of them. They came across the plot of grass on my right. I could see them out of the corner of my eye and I kept right on talking, by Jehovah's grace, *and immediately Chief Hourigan, and in a very courteous manner, approached me and said to me, "Mr. Fowler, have you a permit to give this talk?" I replied, "Chief, you know very well that I need no permit to preach the gospel." I had previously informed him of that fact the week before in the police headquarters; that no nation on earth or city or government can issue a permit to Christians to do something God has commanded them to do, therefore, we need no permit to preach the gospel. And he said then, as he repeated, "I am placing you under arrest for violation of this city ordinance," and I was escorted very courteously to the police car, surrounded by police officers, and taken to headquarters.* Do you wish me to continue?

36 Q. Yes, go ahead. What happened at police headquarters?

[fol. 58] A. Then, I was taken upstairs to Chief Hourigan's office and we sat down to discuss matters with Chief Hourigan and Captain Burns, who, likewise, is here in the courtroom this morning. *I told these two gentlemen that I felt that they had very seriously interfered with the God giving right of Christians in America to exercise their freedom of speech in accordance with the fourteenth amendment of the United States constitution; that we were not there for any evil purpose, but that they knew very well*

we had come to that park for the purpose of doing good and, certainly, the people of Pawtucket need some good instructed into them as well as other cities and towns in the country; and that our sole mission was to exhalt the name of the living God, Jehovah, and tell the people of Pawtucket that His kingdom was at hand; that that kingdom of righteousness is the only possible solution to the world's trouble and is soon to take over and put an end to this terrible condition. I said, "You, gentlemen, instead of interfering with Jehovah's Witnesses in doing this wonderful work, you should be co-operative with us instead of arresting me. You should have stayed at the park and seen that order was observed and that I was given an opportunity to tell the people of Pawtucket God's message.

[fol. 59] The Court: That's what you told him?

The Witness: Yes, sir. And I also backed up my statements by repeated reference to the word of God, the bible. I have my bible right here so I can refer to that very easily.

Mr. Pettine: I don't think that's necessary.

The Court: No, it is a question of place, not of the subject. I don't suppose you insist on coming in here and preaching while conducting a trial?

Mr. Covington: Well, if it happens to be part of the evidence.

The Court: Yes, but how much more? It is just another sermon which I don't object to. I am willing to hear anything, but I don't think it has a bearing on this controversy, really. This was a religious meeting in a public park and the statute specifically prohibited it and the Supreme Court said——

Mr. Covington: It is part of the res gestae that leads up to the filing of the charges and I respectfully submit it is material and could be received. It is not going to run very much longer any how.

[fol. 60] The Court: Go ahead. Finish up what you have to say.

The Witness: Well, my sole purpose in talking——

The Court: —There is a time and place for everything.

The Witness: I might state that my sole purpose in talking to these two gentlemanly police officers in the fashion I did was to drive home to their minds the full realization

of the tremendous responsibility resting upon them for having interferred with this work. That was my sole purpose in talking to them as I did.

37 Q. Didn't you desire to establish in their minds your right to do the work so you might return to it?

A. I certainly did. I plainly pointed out we had a constitutional right and our right had been repeatedly upheld by the United States Supreme Court, repeatedly, on many occasions. And then after talking with them for about an hour and a half, pro and con, the Chief informed me that when arrests were made it was necessary to photograph and fingerprint the criminal arrested and so I was invited to step downstairs to the photograph studio and I sat for a picture; had my picture taken and a nice little [fol. 61] card placed around my neck with a number. I don't know what it was but it was there and then I was fingerprinted for the Rogue's Gallery and then court was called into session shortly after that. Judge—I can't remember his name.

The Court: Connell.

The Witness: Connell, yes, sir. That's correct. Judge Connell was in session and I pleaded not guilty to the charge against me of violating the city ordinance. Judge Connell very courteously allowed me to go on my own recognizance and I did.

The Court: Is it necessary to go further?

Mr. Covington: That's all.

The Court: Any more questions? Any cross examination?

Mr. Covington: That's all.

Cross examination.

By Mr. Pettine:

38 Q. You are a reverend father; is that correct?

A. No, sir, emphatically not. A minister of the gospel, a real minister of the gospel has no title whatsoever.

[fol. 62] 39 Q. I will address you as Mr. Fowler.

A. Thank you, sir.

40 Q. Mr. Fowler, there is no question but what you were there on September 3rd, 1950?

A. Not the slightest.

41 Q. No question but what this meeting was a religious meeting?

A. Yes, sir, that's correct.

42 Q. That it was a religious meeting?

A. It was a religious meeting.

43 Q. There is no question but what you addressed it?

A. I certainly did.

44 Q. There is no question in your mind, is there, that Slater Park is a public park?

A. No, no question about that.

45 Q. There is no question in your mind that these people were not visiting, but rather were assembled there for the holding of a religious meeting?

A. Correct.

46 Q. And in so far as the circulation of these hand bills are concerned to which you testified, can you tell us whether that is confined to the City of Pawtucket or whether it also went beyond the limits of the City of Pawtucket?

[fol. 63] A. Well, I wouldn't be able to say definitely about that, but I would assume that it covered environs within the Pawtucket area, if there are any suburbans to Pawtucket it might have covered them because Jehovah's Witnesses usually go to from door to door with these flyers, too, as well as stand on the streets.

47 Q. In other words, to your knowledge, strike that.

48 Q. In other words, you can't say whether it was actually confined to Pawtucket or not; is that right?

A. I can't, no, sir. I wasn't there.

49 Q. When the flyers were given out. So, whether any of those got into Providence or cities of the State——

A. —I couldn't tell you, sir, a thing about it.

50 Q. You don't know. They may very well have.

A. Maybe so.

51 Q. And whether the people were from Providence or were from Westerly or any party—any part, they were all invited to come to Slater Park in Pawtucket?

A. They were.

52 Q. Is that correct?

A. That's correct.

53 Q. Now, you did say there was a wall of police officers as I recall?

A. I used that term I believe.

[fol. 64] 54 Q. There is no question, is there, Mr. Fowler, they were very courteous?

A. Oh, they were. I couldn't have asked for more.

55 Q. Chief Hourigan has always been courteous?

A. Very much so.

56 Q. Tell me this, Mr. Fowler, do you know whether or not any attempt was made by the members of the Jehovah Witnesses to secure a building for the purpose of your talk upon this particular day?

A. Well, I don't think it was for this talk because they wanted to give this talk in the open. During the summer months we carry on public lectures in the parks all over the United States and in foreign countries as well.

57 Q. Well, is it a fair statement to say to your knowledge no effort was made to get a building or church?

A. I think that is correct.

58 Q. You will say that is correct?

A. Yes, sir.

59 Q. Now, you also made one other statement, Mr. Fowler, you said that you told Chief Hourigan, as I recall it, that instead of arresting you you felt that he should have stayed—co-operated with you and saw to it that order was observed, that's as I recall it.

A. Let me qualify that statement. If there was any occasion for it, order to be observed, put it that way you [fol. 65] will have it right. There was no occasion for it ever.

60 Q. Did you say that?

A. Oh, I did say it.

61 Q. So, in other words, it is fair to assume that, to your knowledge, you didn't know whether there would be order or not, did you?

A. Well, one can never tell. We are not prophets. We can't see the future, any of us.

62 Q. Am I being fair in that you don't know whether there was going to be order or not?

The Court: He said he didn't know what might happen. It is always possible in large assemblies that some person will misbehave.

63 Q. Tell me this, Mr. Fowler, to your knowledge there are auditoriums in the City of Pawtucket, aren't there?

A. I didn't quite get the question.

64 Q. To your knowledge, well, strike it.

65 Q. Let me put it this way: Are you familiar with the City of Pawtucket at all?

A. No, sir.

66 Q. So you don't know what the situation might be as to auditoriums and building?

A. No, I do not.

[fol. 66] Q. Mr. Fowler, you stated that, in your opinion, you know very well that no permit is necessary to preach the gospel?

A. That's correct.

68 Q. Now, do you believe, then, that you have a right to hold a meeting at any place, anytime you see fit?

A. Well, that's rather a catchey question and I will answer it this way: We have a perfect right to hold meetings under conditions suitable for meetings of that kind for religious gatherings. We wouldn't, as Witnesses of Jehovah and law-abiding citizens of this land, take matters into our own hands and deliberately go out into the middle of a public square and hold a meeting. That would be a crazy thing to do. Jehovah Witnesses are Christians and law-abiding citizens, first, last and all of the time. And we will obey every good law that does not contravene the law of God, but when human laws contravene God's law we object.

The Court: Do you claim this is objectionable to the divine law?

The Witness: Yes, I have the law. It reads like this in Matthew 24-14: "This gospel of the Kingdom shall be preached." Jesus, in Matthew 28, He said: "Go you into all the world and make disciples of all men and tell them about God's Kingdom."

[fol. 67] The Court: I just wanted to understand you, if you thought you were the judge of what law should be obeyed.

The Witness: No, sir. Our decisions are guided always by the word of God. That's our guide.

69 Q. Now, Mr. Fowler, then, you readily admit, in your opinion, that you's have no right to go into a trafficated public square to hold a meeting?

A. No, I shouldn't say so, not unless we thought the square was large enough and the police agreed that it would be okay. If they agreed to that, why, and it wouldn't be means of blocking traffic, all right. I know up in Massachusetts in the Town of Natick there is a public park right near the center of town. We had a meeting there, a large meeting, not so long ago. No objection was raised to that.

70 Q. What if it is a trafficated section with traffic in the city, you do admit that you think that would not be a proper place to hold a meeting?

A. Why, I would say it wouldn't be a proper place. It would be noisy, cause confusion, and no particular good could be accomplished that I can see. We much prefer a park where it is quiet and people can assemble peacefully. [fol. 68] 71 Q. You keep qualifying your answers. Now, one of the other reasons, too, would be that it would interfere with the normal flow of traffic and normal traffic of people on the street and disrupt the orderly running of the city; isn't that right?

A. Why, possibly. I don't see what that's got to do with Slater Park.

72 Q. I am not asking you that, Mr. Fowler, I am asking you a question.

Mr. Covington: Well, I don't think we ought to go off into hypothetical questions.

The Court: I don't see much materiality in all this anyway. Of course, the civil law I act to enforce the civil law as I read it regardless of my religious beliefs and if this ordinance—our Supreme Court said it is constitutional—that's all there is to it. I don't see how all this talk has anything to do with it.

Mr. Pettine: He brought it out, Your Honor.

The Court: Any—every order believes they have a right and that they are divinely commissioned to save the world and perhaps, too, take most any means to accomplish that. [fol. 69] I can't pass upon that and I don't intend to.

The Witness: If it please the Court, you asked me a question awhile ago. I'd like to amplify my reply if

I may. There is one scripture that I should have quoted to you. As far as Christians are concerned, the Apostle Peter says, "We are to obey God rather than men." And, so, we operate on that basis; that God's commands are far greater than men's and must be obeyed. Failure to obey God's commands means death to the individual who fails to do so.

The Court: Any more questions of this man?

Mr. Covington: Just one or two questions, Your Honor.

Redirect examination.

By Mr. Covington:

73 Q. Mr. Fowler, Jehovah's Witnesses do have a regular meeting place in Pawtucket; do they not?

A. Oh, yes, indeed, a very splendid place.

74 Q. Where is it located?

A. On Roosevelt Avenue. I think it is 21,—21 Roosevelt Avenue, right near the police headquarters, by the way.

[fol. 70] 75 Q. It is a part of the policy of Jehovah's Witnesses to use open air places like parks in the summer; is that correct?

A. That's correct, only in the summer time or when the weather is of such a nature that it would be profitable.

76 Q. Now, I believe you have stated the police were quite courteous to you on September 3rd.

A. Yes, sir.

77 Q. Were they courteous and nice to you on the week previous when you were taken in?

Mr. Pettine: Objection.

A. They ignored me.

The Court: Sustained.

Mr. Covington: I think it would throw some light on the situation which is different from the interpretation that is left, that the police were quite disorderly and disrupted this meeting and dragged this man to the police headquarters.

The Court: He has his legal remedy. He can sue them. That's the way to vindicate your rights as a citizen against the police.

Mr. Covington: That's true.
The Court: Any more questions?
Mr. Covington: That's all.
Mr. Pettine: That's all.
The Court: That's all.

[fol. 71] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Covington: May it please the Court, the defendant at the close of all of the evidence makes a motion for a judgment of acquittal and for the finding of not guilty. Oh, we rest. I assume there will be no rebuttal.

The Court: Is there any rebuttal?

Mr. Pettine: No rebuttal.

The Court: The defendant rests and there is no rebuttal.

Mr. Covington: I will continue with my motion. I am making a motion briefly and ask leave to state it to the stenographer and later reduce it to writing and file it with the clerk. Will the Court permit me to do that?

The Court: Our pleadings in criminal cases are practically all oral.

Mr. Covington: All right. If it is not necessary, then, I will do it as I did with the motion to quash and the other motion at the end of the State's case and continue. And this is made purely for the sake of the record so that the record will show that we are raising, in these proceedings, the same legal questions that were raised in the certified question, No. 626 in the Supreme Court, State vs. William [fol. 72] B. Fowler, which now comes the defendant at the close of all the evidence and moves the Court for a judgment of acquittal and for finding him not guilty on the grounds that the evidence in this case shows that Section 11 of Chapter 149 of the ordinances of the City of Pawtucket, approved April 17, 1916, on its face and as construed and applied is unconstitutional because it abridges the rights of the defendant's freedom of speech, freedom of assembly and freedom of worship, contrary to the first and fourteenth amendments to the United States constifution and Sections 3, 10, and 21 of the constitution of the State of Rhode Island of Article I.

The Court: We render decisions and not judgments at this point.

Mr. Covington: Yes, Your Honor, I'd like to have the matter corrected and make a motion for decision acquitting the defendant.

The Court: Well, I don't think I need to hear much argument, if you have got it all on the record.

Mr. Covington: I have stated everything I want and I am not going to argue this case. We have already had our argument in these proceedings by going up on the certified question to the Supreme Court.

[fol. 73] DECISION OF COURT

The Court: That's what I assume; that I have nothing to do at this proceeding but to follow the Supreme Court and I am bound by the civil law anyway and when the Supreme Court says a thing it is so with me regardless of my own private views on the matter, and I am not saying that I don't agree with them either. I will deny your motion and I will find the defendant guilty.

Mr. Covington: All right, sir.

The Court: Do you want to waive any motion; you are not going to ask for new trial?

Mr. Covington: We waive a motion for new trial.

Mr. Arabian: I was going to ask before we got further that we have an exception noted to the denial of the motion and to the decision.

The Court: Yes, you may have. You waive your motion for new trial?

Mr. Covington: Yes.

(Defendant's Exceptions Noted.)

The Court: Will the State move for sentence?

Mr. Arabian: I suppose the next thing we will have to do is file our notice of intention within seven days.

[fol. 74] Mr. Pettine: I think we should move for sentence at this time.

Mr. Covington: We don't object to that, Your Honor.

The Court: Well, you move for sentence.

Mr. Pettine: Well, yes, I move for sentence at this time.

The Court: I will sentence him to pay a fine of $5.00.

Mr. Covington: All right. We are taking exception to the Court's decision and also the judgment pronouncing

sentence and we propose to take an appeal to the Supreme Court of this State, of course, which will follow the former certified question and from there we go to the Supreme Court of the United States, and having that thought in mind and desiring to avoid any possibility of the question becoming mute on further appeal, we ask leave of Court to stay execution of judgment and allow us to file a bond for that purpose, pending a final disposition of this case in the higher courts.

The Court: Well, we certainly won't commit the man for not paying right away. You can write out your notice right away.

[fol. 75] Mr. Arabian: Yes, Your Honor. We can file that immediately.

The Court: I am sure the State will co-operate.

Mr. Covington: Your Honor, we would have gone to the Supreme Court of the United States had we the right to do that, but we had no decision to take such step from and so now we have got to go back through and we don't want to have any muteness in the case by payment of fine.

The Court: If there is anything we have done today that you find to be irregular to prevent your going up to the Supreme Court of the United States, we will try to correct it. We want you to have every opportunity to vindicate your rights if you have them.

Mr. Covington: We do not feel that there has been any irregularity committed by the Court. We merely asked that the judgment be stayed on such terms as may be laid down according to the Court and law of Rhode Island so we might appeal.

The Court: I am sure the State won't move to have him committed. You can make it out right away.

[fols. 76-77] The Court: Any further proceeding in this matter?

Mr. Covington: Nothing further, Your Honor.

(Hearing adjourned.)

Stenographer's Certificate to foregoing transcript omitted in printing.

[fol. 78] IN SUPREME COURT OF THE STATE OF RHODE ISLAND

C. Q. No. 626.

STATE

v.

WILLIAM B. FOWLER.

OPINION

CONDON, J.:

This is a criminal complaint which charges the defendant with making a public address to a religious meeting in Slater Park, a public park in the city of Pawtucket, in violation of section 11 of chapter 149 of the ordinances of that city. After trial and conviction in the district court the defendant appealed to the superior court and claimed a jury trial.

When the case was called for trial in the superior court and before a jury was impaneled defendant, by leave of court, moved to quash the complaint on the grounds that the ordinance abridged and denied the rights of free assembly, free speech, and free worship guaranteed by the first and fourteenth amendments to the constitution of the United States and by the constitution of this state. The trial justice declined to rule on the motion because he deemed the constitutional questions thus raised to be of such doubt and importance that they should be certified to this court for our determination pursuant to general laws 1938, chapter 545, §6, as amended by public laws 1940, chap. 941, sec. 2.

Under that statute the superior court is authorized to certify only the questions raised and not the cause itself. *United States Trust Co.* v. *Tax Assessors of City of Newport*, 47 R. I. 420. The trial justice accordingly entered [fol. 79] a formal order certifying the following specific questions:

> "Is Section 11 of Chapter 149 of the ordinances of the City of Pawtucket, approved April 17, 1916, on its face and as construed and applied unconstitutional because it abridges the rights of the defendant to Free-

dom of Speech, Freedom of Association, and Freedom of Worship, contrary to the First and Fourteenth Amendments to the United States Constitution.

"Is Section 11 of Chapter 149 of the ordinances of the City of Pawtucket, approved April 17, 1916, contrary to the provisions of Article I of the Constitution of the State of Rhode Island, with particular reference to Sections 3, 10, and 21."

Since only those questions and not the case are before us we must pass upon the constitutionality of the ordinance without reference to the circumstances out of which the case arose and was originally heard in the district court.

On its face the ordinance, which is hereinafter set out in full in the appendix, prescribes in a series of sixteen sections certain conditions under which any person may lawfully avail himself of the privilege of using the parks belonging to and maintained by the city. One of such conditions is contained in section 11 which defendant is charged with violating. That section reads as follows:

"No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park."

The prohibition therein is not directed at any particular religious group, but is general and applies without question to all such groups and to all political groups as well. [fol. 80] The ordinance as a whole represents an exercise of the power which the city council has over the management and control of municipal property. Apparently in the exercise of that power the city council decided that the city's parks would more certainly serve the purpose of their establishment as areas of rest and recreation if they were not allowed to become forums of either religious or political controversy. This ordinance is not a legislative act of recent origin nor is it specially directed at the activities of the sect which the defendant represents. Rather it is a municipal regulation of long standing as is evidenced by the date of its approval, April 17, 1916, and hence it

antedates by many years the recent prominence of that sect in federal litigation.

We are satisfied that the ordinance was designed not to interfere with freedom of assembly, nor to fetter freedom of speech or prohibit religious worship, but solely to guard the city's parks from being used for activities that reasonably could lead to annoyance and disorder and to that extent defeat the ends for which the city had established the parks as public areas of rest and recreation. The prohibitions contained in the ordinance including section 11 are quite definitely directed to that end. Out of its experience in conducting the prudential affairs of the city, the city council evidently was convinced that public addresses to religious or political groups in the parks would not be consistent with the purpose for which the parks were being maintained at public expense. Viewed in that light the ordinance appears to be a reasonable police regulation, and as such the people of Pawtucket have long acquiesced [fol. 81] in its validity. It is attacked here, for the first time as far as we are aware, thirty-five years after its approval.

The defendant claims that he has a constitutional right to speak in any public park. He concedes that the city may reasonably regulate that right but that it cannot wholly prohibit its exercise. In other words, he asserts not only the right of free speech but also the privilege of a free forum in which to exercise that right. And he contends that he is supported in such view by the highest judicial authority. He relies on a number of recent cases decided by the supreme court of the United States where various kinds of municipal ordinances or administrative practices were held violative of the rights guaranteed by the first amendment to the constitution of the United States and made applicable to the states by the fourteenth amendment. Many of those cases do not involve an ordinance which conditions the lawful use of a municipally owned park upon compliance with certain definite regulations that are not discriminatory. However, some of them do involve such an ordinance or the opinions refer to the right to use such a park. The most important of those cases and the ones upon which defendant appears to rely most strongly are *Hague* v. *Committee for Industrial Organiza-*

ion, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147; *Jamison* v. *Texas*, 318 U. S. 413; *Saia* v. *New York*, 334 U. S. 558; and *Niemotko* v. *State of Maryland* and *Knuz* v. *People of the State of New York*, both reported in 19 Law Week 4095 and 4102, and decided by the supreme court of the United States January 15, 1951.

The defendant in his brief has quoted in part from and appears to lay particular stress upon the language of Mr. [fol. 82] Justice Roberts announcing the decision of the court in *Hague* v. *Committee for Industrial Organization*, *supra*, at page 515, as follows: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

Apparently the learned justice was only speaking for himself and two of his associates. Moreover, we are at a loss to know what was intended by that declaration especially since it was made in essaying a distinction between the case then before the court and *Davis* v. *Massachusetts*, 167 U. S. 43, which upheld the conviction of Davis for preaching on Boston Common in violation of an ordinance like the one in the case at bar. Singularly enough that case was not overruled in the *Hague* case and as far as we are aware has not been overruled, although the court has had occasion to refer to it in several later cases. In the circumstances *Hague* v. *Committee for Industrial Organization*, *supra*, can hardly be considered decisive of the case before us. Incidentally in the later case of *Saia* v. *New York*, 334 U. S. 558, which involved the use of a "loud speaker" in a public park, Mr. Justice Jackson dissented and made the following observation concerning the quotation from Mr. Justice Roberts' opinion in the *Hague* case: "The case of *Hague* v. *C. I. O.*, 307 U. S. 496, cannot properly be quoted in this connection, for no opinion therein was adhered to by a majority of the Court. The quotation in the Court's opinion today had the support [fol. 83] of only two Justices, with a possible third. The failure of six or seven Justices to subscribe to those views

would seem to fatally impair the standing of that quotation as an authority." 334 U. S. 558, 568, Footnote 1. If notwithstanding such criticism, the previously-quoted language of Mr. Justice Roberts in the *Hague* case, *supra*, is to be deemed as binding authority impliedly overruling *Davis* v. *Massachusetts*, *supra*, a great service to state courts would be performed if the supreme court itself would make that overruling clear and definite so that courts would have no reason to be misled in the future. We cannot safely rely upon some other court's interpretation of the language and effect of that case. So long as the *Davis* case stands without being specifically overruled by the supreme court itself, it is difficult for us to say that an ordinance substantially the same as the one involved in the *Davis* case is nevertheless unconstitutional beyond a reasonable doubt.

The defendant, however, points to *Saia v. New York* and *Niemotko v. State of Maryland supra*, decided since the *Hague* case, as clear instances where the supreme court has definitely included public parks, as well as highways, within the orbit of its decisions protecting the freedoms of the first amendment from local abridgment or denial. In each of those cases it is true that the locus of the forbidden act was a public park but there the similarity to the case at bar ends. In the *Niemotko* case there was no ordinance of general application involved but rather an act of arbitrary discrimination by an administrative official. Indeed at the very outset of its opinion in that case the court observed that there was no ordinance regulating the use of the park in question.

[fol. 84] As far as the *Saia* case is concerned the ordinance there prohibited the use of a "loud speaker" device which casts its sound directly upon streets and public places. A public park was only incidentally involved because the defendant set up his "loud speaker" in such a place. He was arrested for using a "loud speaker" in defiance of the ordinance, not for making a public address in the park. The ordinance in question apparently was not invoked by the city to prohibit public addresses to a religious meeting in the park. The court in a five-to-four decision held that the city could not ban the use of a loud speaker in the manner provided in that ordinance because such use was

comprehended within the constitutional guarantee of freedom of speech under the first amendment. It was upon that question that the court split. We do not think that point of decision is relevant to the particular controversy in the case at bar. Moreover the authority of the *Saia* case would seem to be questionable in view of the decision in *Kovacs v. Cooper*, 336 U. S. 77.

In the *Kovacs* case the court upheld an ordinance which prohibited the use of "loud speakers" on the streets and public places of Trenton, New Jersey. Mr. Justice Frankfurter and Mr. Justice Jackson who had dissented in the *Saia* case concurred in the decision and commented adversely on the *Saia* decision. The former said it would be "to start with an unreality" to rest the *Kovacs* decision on that case, and the latter expressly said that *Kovacs* repudiated *Saia*. Three justices who had concurred in the *Saia* decision dissented in the *Kovacs* case and also stated that the decision repudiated the holding in the *Saia* case. Later in *Niemotko v. State of Maryland, supra*, Mr. Justice Frankfurter concurring in a separate opinion said: [fol. 85] "In *Kovacs* v. *Cooper*, 336 U. S. 77, part of the Court construed the ordinance as allowing conviction for operation of any sound truck emitting 'loud and raucous' noises, and part construed the ordinance to ban all sound trucks. The limits of the decision of the Court upholding the ordinance are therefore not clear, but the result in any event does not leave the *Saia* decision intact." And perhaps *Breard v. City of Alexandria*, 19 Law Week 4375, is a further indication of a more restrained approach to the solution of conflicts over local limitations on those freedoms. One of the dissenting justices therein goes so far as to say that such decision overrules certain prior cases in which the court declared invalid certain municipal ordinances as violative of liberty of speech, press and religion. In any event explicit clarification would seem to be necessary if the trial courts are to be given a clear guide for deciding in those cases that legislative enactments are beyond reasonable doubt of conflict with the constitution of the United States.

We are of the opinion that the other cases cited by the defendant afford no stronger support to his contention than those above mentioned and, therefore, we need not discuss

them here. Moreover we are convinced that the case at bar is clearly ruled by *Davis v. Massachusetts*, 167 U. S. 43. The justice of the district court expressly relied upon that case in finding the defendant guilty. Perhaps a brief discussion of its background should be made here because it is obviously a decision that the supreme court of the United States has been reluctant to disturb in spite of language in a number of more recent opinions which might seem to be inconsistent therewith. In our opinion it is a [fol. 86] case more nearly on all fours with the one at bar than any of the cases relied upon by the defendant.

Davis contended that he had a constitutional right guaranteed by the fourteenth amendment to the constitution of the United States to preach the gospel on Boston Common notwithstanding an ordinance which expressly forbade the making of a public address upon any public grounds except by permission of the mayor. The supreme judicial court of Massachusetts in upholding his conviction unanimously held that the ordinance was constitutional. *Commonwealth v. Davis*, 162 Mass. 510. That court held that the constitutionality of the ordinance was not open to doubt and that it was a fallacy to assume that it was "directed against free speech generally * * * whereas in fact it is directed toward the modes in which Boston Common may be used." It is interesting to note that this opinion was rendered by Mr. Justice Holmes.

In a concurring opinion in *Kovacs v. Cooper*, 336 U. S. 77, 95, Mr. Justice Frankfurter said: "The ideas now governing the constitutional protection of freedom of speech derive essentially from the opinions of Mr. Justice Holmes. * * * Accordingly, Mr. Justice Holmes was far more ready to find legislative invasion where free inquiry was involved than in the debatable area of economics." Few will deny the accuracy of this estimate of Mr. Justice Holmes' judicial disposition and his basic influence in promoting this branch of the law to its present state of development. Apparently, however, he was far from ready, despite his solicitude for these precious freedoms, to deprive a municipality of its power to control the use of its own property. [fol. 87] After Mr. Justice Holmes had been elevated to and had served on the federal supreme court for eight years he apparently continued to be of the opinion that state

laws should not be hurriedly overthrown as violative of the bill of rights or the fourteenth amendment. Speaking for a unanimous court in *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110, he said that "we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States judges should be slow to read into the latter a *nolumus mutare* as against the law-making power."

When *Commonwealth v. Davis, supra*, was appealed by Davis to the supreme court of the United States he contended that the local law under which he was convicted was contrary to the fourteenth amendment to the constitution of the United States. There Mr. Justice White, speaking for a unanimous court, rejected such contention saying: "The Fourteenth Amendment to the Constitution of the United States does not destroy the power of the States to enact police regulations as to the subjects within their control * * * and does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the constitution and laws of the State." And he concluded with the following words, so [fol. 88] apposite in our opinion to the case at bar: "The plaintiff in error cannot avail himself of the right granted by the State and yet obtain exemption from the lawful regulations to which this right on his part was subjected by law." Unless the *Davis* case is no longer the law the ordinance in question here is valid and binding upon the defendant.

Before concluding our consideration of this contention perhaps some reference should be made to defendant's argument that a religious address may be permitted in a public park without contravening the concept of separation of church and state as expounded in the recent case of *McCollum v. Board of Education, Etc.*, 333 U. S. 203.

Defendant has pressed this point at considerable length in his brief and in his oral argument. This appears to be an act of supererogation, as the state is not claiming that the ordinance is valid on the strength of the *McCollum* case, but frankly concedes that the parks may be used for certain religious purposes. We quote the following from page 19 of its brief: "There is nothing in this ordinance, which would prohibit religious services of any kind from being held in the public parks of the City. There is nothing in this ordinance which prohibits or restricts any individual from offering prayer or singing hymns or conducting a religious ritual in the public parks. It is only an address on such an occasion that is prohibited by this ordinance." We are therefore not called upon to decide whether the constitutional doctrine of the *McCollum* case which denies the use of a public school for a period of religious instruction nevertheless permits the use of public parks for religious services.

[fol. 89] Defendant has also contended that section 11 violates the rights guaranteed by sections 3, 10 and 21 of article I of the constitution of this state. Although defendant did not point out those sections specifically in his motion to quash, as he should have done, the trial justice in his order of certification assumes that they are the sections relied upon. We have no hesitancy in saying that insofar as those sections secure the freedoms of assembly, of religion, and of speech, section 11 of the ordinance here in question does not in any true sense violate them.

This court has not given to those guarantees the wide sweep which the federal supreme court in the last decade or two has given to similar guarantees in the first amendment to the federal constitution. Of course we are in complete accord that such rights must be vigilantly guarded not only from direct but also from indirect attacks. Insidious no less than open assaults upon them must be sternly resisted if they are not to be lost by erosion. But we are also aware that true liberty of any kind cannot exist without public order. Preservation of the balance between liberty on the one hand and authority and order on the other has ever been a difficult task for the courts and no less difficult for those immediately charged with the duty of maintaining public order. It should be our constant

concern while safeguarding the first not to go so far as to make unduly difficult or perhaps impossible the discharge of the other.

In such frame of reference we have considered the questions propounded here. As far as our state constitution [fol. 90] is concerned we see nothing contrary thereto in this ordinance. As to the federal constitution we follow the law as declared by the United States supreme court. It has unequivocally declared in *Davis v. Massachusetts, supra,* that an ordinance like the one in the case at bar does not violate that constitution. In no later decision do we find that the supreme court has definitely overruled that case and decided to the contrary. We, therefore, hold on the authority of that case that the ordinance in question does not violate the federal constitution.

Accordingly we answer in the negative each question set out in the order of certification, and the papers in the case are ordered sent back to the superior court for further proceedings.

BAKER, J., dissenting:

I am unable to agree with the majority opinion because in my judgment section 11 of chapter 149 of the ordinances of the city of Pawtucket enacted August 17, 1916 is clearly prohibitory and not in any sense merely regulatory in respect to the right of free speech in a public park in that city. The section does not even contain, for what it may be worth, a provision that a license may be issued by a municipal authority permitting the making of an address in any manner, at any time, or in any place. It may be that other sections of the chapter are regulatory in nature, but they in no way refer to or have any connection with section 11, which is the only portion of the chapter material to the questions before us. Since section 11 is plainly distinct and separable from the rest of the chapter the validity of that section should rest upon its own language without reference to other clearly unrelated provisions of said chapter.

[fol. 91] Also in my opinion *Davis v. Massachusetts,* 167 U. S. 43, upon which the majority of the court relies, cannot properly be held to govern the instant case. While it is true that the above-cited case has never been specifically

overruled by the supreme court of the United States, nevertheless in my judgment that court, in later decisions where it referred to the *Davis* case, has so weakened its effect as an authority that I am unable to accept it as controlling here. Among such decisions are *Hague v. Committee for Industrial Organization*, 307 U. S. 496, *Jamison v. Texas*, 318 U. S. 413, *Saia v. New York*, 334 U. S. 558, and *Niemotko v. State of Maryland*, 19 Law Week 4095. See also *Milwaukee County v. Carter*, 258 Wis. 139, a recent opinion of a state court of last resort. Several of these cases involve the right of free speech in public parks. The general principles of law applicable to the right of freedom of speech and assembly under the first and fourteenth amendments of the constitution of the United States, as set out in such cases and in others, are in substance inconsistent with and contrary to the holding in the *Davis* case.

In addition it may be noted that in *Commonwealth v. Gilfedder*, 321 Mass. 335 (1947), the supreme court of that state, in a case involving the right to make an address on Boston Common contrary to an ordinance of that city and certain rules of the board of park commissioners, held such ordinance and rules to be in conflict with the rights of freedom of speech, of the press, and of assembly guaranteed by the first amendment to the constitution of the United States. At page 342 of that opinion the court makes the following comment: "We confess to difficulty in reconciling the present decision with the decisions in the *Davis* cases. [fol. 92] Nevertheless, we feel compelled to the result now reached by the broad sweep of principles set forth in great amplitude in more recent decisions of the Supreme Court of the United States."

For the reasons stated it is my opinion that section 11 of chapter 149 of the ordinances of the city of Pawtucket is contrary to the pertinent provisions of the first and fourteenth amendments to the United States constitution. I therefore answer in the affirmative the first question certified to us by the trial justice.

In view of the fact that I have construed section 11 of the ordinance to be invalid under the federal constitution, and further as the defendant in his motion to quash did not specifically point out the particular sections of the constitution of this state which he alleges are violated by

section 11, as our well-established practice requires, I am of the opinion that it is unnecessary for me to answer the second question certified by the trial justice.

Capotosto, J. concurs in the dissenting opinion of Mr. Justice Baker.

[fol. 93] APPENDIX

"Chapter 149

Approved August 17, 1916

An Ordinance Providing Rules and Regulations for Public Parks in the City of Pawtucket

It is ordained by the City Council of the City of Pawtucket as follows:

Section 1. No person is allowed to land or take passengers on any boat from the banks of the pond. Any person entering or leaving a boat must do so at the landing provided therefor.

Sec. 2. No person is allowed to occupy the tennis court for more than one hour if other patrons of the Park are waiting to play. While playing on the tennis court patrons must wear shoes without heels or spikes.

Sec. 3. No person is allowed to use profane language in the Park and Ladies and Children must not be annoyed or molested by anyone.

Sec. 4. Slater Park shall be open to the public from sunrise until eleven o'clock afternoon from April first to November first, and from sunrise until ten o'clock afternoon from November first to April first in each and every year; and no person shall enter or be within the limits of said park except between said hours without permission from the Commissioners or Superintendent of Parks.

Sec. 5. No person shall take, pluck, injure, destroy, cut, mark or deface any flower, root, plant shrub, tree, building, fence, monument or other property in any park. No person shall throw a stone or other missile in any park.

[fol. 94] Sec. 6. No person shall ride or drive within any park at a rate of speed exceeding ten miles per hour. No

person shall ride or drive any animal, bicycle or other vehicle except upon the driveways; nor ride or drive any animal, bicycle or vehicle upon other than the right hand side of the driveways, except to cross such driveway or to turn out for some obstruction, or for some animal, bicycle or other vehicle going in the same direction.

Sec. 7. Automobiles, or other vehicles, must not be driven faster than ten miles per hour within the limits of the Park.

Sec. 8. No person shall drive any heavy team, nor any swill or residuum cart, nor any team or carriage for the purpose of business, into any park, without permission from the Commissioners or Superintendent of Parks.

Sec. 9. All vehicles while within the limits of the Park must conform strictly to law regarding lights to be carried.

Sec. 10. No person shall bathe or fish in, nor go into, nor send any animal into, any of the waters of any park, nor disturb any of the fish, birds, water fowl or animals in any park, nor throw or place any article or thing in said waters; provided however, that fishing in any such waters from boats owned by the City of Pawtucket may be allowed by the park commissioners at such times and under such regulations and upon payment of such fees as said commissioners may from time to time prescribe and determine.

[fols. 95-96] Sec. 11. No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park.

Sec. 12. No person, being the owner or having the charge or custody of any dog, cat, fowl, goat, swine or neat cattle, shall allow such dog, cat, fowl, goat, swine or neat cattle to enter any public park or to remain therein.

Sec. 13. No person except in the employ of the commissioners or superintendent of parks, shall light, build or make any fire in any park, square or public grounds.

Sec. 14. No automobile, or other vehicle, shall be permitted to remain stationary in any part of said park for a longer period than ten minutes, except in such locations as shall be assigned for such purpose by the park commission; and any person in charge of such automobile or other vehicle shall at any time, upon the direction of any officer,

immediately remove such automobile or other vehicle to such location as such officer shall direct.

Sec. 15. Any person violating any of the provisions of this ordinance shall be fined not exceeding twenty dollars, or be imprisoned for a term not exceeding ten days for each offense.

Sec. 16. This ordinance shall take effect upon its passage.

[fol. 97] IN SUPREME COURT OF RHODE ISLAND

[Title omitted]

PETITION FOR APPEAL, STATEMENT, ASSIGNMENTS OF ERROR AND PRAYER FOR REVERSAL

Considering himself aggrieved by the final decision by the Supreme Court of Rhode Island in the above entitled cause, the above named appellant hereby prays that an appeal be allowed to the Supreme Court of the United States herein, and for an order allowing same and fixing the amount of the bond thereon.

Statement

This case is one in which the validity of the state legislation is drawn in question, to wit, an ordinance of the City of Pawtucket, Rhode Island, Chapter 149, which, among other things, reads as follows:

> "No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the [fol. 98] auspices of such club or society in such park."

Said ordinance was in force and effect at the time of the facts alleged in the petition for appeal appearing above. It is drawn in question upon the ground that it is repugnant, as enforced by the State, to the First and Fourteenth Amendments to the United States Constitution.

Therefore in accordance with the rules of the Supreme Court of the United States (Rule 46, paragraph 2) and 28 U. S. C. Sec. 1257 (2) and Section 237 (a) of the Judicial Code, the appellant re-pectfully shows this Court that this case is one in which, under the legislation in force when the Act of January 31, 1928 (45 Stat. L. 54) was passed, to wit, under Section 237 (a) of the Judicial Code (28 U. S. C. Sec. 344), a review could be had in the Supreme Court of the United States on a writ of error as a matter of right.

Assignments of Error

Now comes the appellant in the above cause and files herewith, together with his petition for appeal, these assignments of error and says that they are errors committed by the Supreme Court of Rhode Island in the record and proceedings of the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States says that the Supreme Court of Rhode Island erred in the judgment affirming the conviction entered against appellant because the ordinance is unconstitutional because, both on its face and as construed and applied, it abridges the rights of freedom of assembly, freedom of speech, and freedom of worship, contrary to the First and Fourteenth Amendments to the United States Constitution and Sections 3, 10 and 21 of Article I of the Constitution of Rhode Island.

[fol. 99] Prayer for Reversal

For and on account of the above errors, the above-named appellant prays that the said judgment of the Supreme Court of Rhode Island, hereinabove described in the above entitled cause be reviewed by the Supreme Court of the United States and reversed, and a judgment rendered in favor of appellant, and for his costs.

Hayden C. Covington, 124 Columbia Heights, Brooklyn 2, New York, Counsel for Appellant.

[fol. 100] IN SUPREME COURT OF RHODE ISLAND

[Title omitted]

ORDER ALLOWING APPEAL—August 19, 1952

The appellant in the above entitled cause having prayed for the allowance of an appeal from the judgment of the Supreme Court of Rhode Island on August 12, 1952, which became final on August 12, 1952, and having presented and filed his petition for appeal, assignment of error, prayer for reversal, and statement as to jurisdiction, pursuant to the applicable rules and statutes,

It is ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States as provided by law, and

It is further ordered that the Clerk of the Supreme Court of Rhode Island shall prepare and certify a transcript of the record herein containing a true copy of all of the material parts which shall be designated by praecipe filed with him by any of the parties hereto, and transmit the same to the Supreme Court of the United States so that the transcript shall reach said Court on or before forty days of this date, and

It is further ordered that execution and enforcement of the judgment and decree entered by the Superior Court and [fol. 101] the decree entered by the Supreme Court of Rhode Island, affirming the judgment of the Superior Court, dated August 12, 1952, in this case be, and the same is hereby stayed pending a final disposition of this appeal in the Supreme Court of the United States; and

It is further ordered that the appellant shall execute a good and sufficient security bond in the sum of Five Hundred Dollars ($500.00), said bond to be subject to the approval of the Clerk of the Supreme Court of the United States.

Felix Frankfurter, Associate Justice, Supreme Court of the United States.

Dated this 19th day of August, 1952.

[fol. 102] Citation in usual form showing service on Raymond J. Pettine—omitted in printing.

[fol. 103] Bond on appeal for $500.00 approved—omitted in printing.

[fol. 104] Notice Calling Appellee's Attention to Rule 12—(omitted in printing.)

[fol. 105] Acknowledgment of Service—(omitted in printing.)

[fol. 106] IN SUPREME COURT OF RHODE ISLAND

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF THE RECORD

To the Clerk of the Supreme Court of Rhode Island:

Please incorporate the following documents into the transcript of the record on appeal to the Supreme Court of the United States, which appeal has been heretofore prayed for and allowed from the final judgment of the Court in the above entitled action, to wit:

1. Bill of exceptions from the Superior Court filed in this cause.

2. Opinion of the Supreme Court of Rhode Island in this case and the former opinion in C. Q. No. 626 in this Court.

3. Final judgment of affirmance by this Court.

4. Petition for appeal, statement, assignments of error and prayer for reversal.

5. All of the docket entries of the Supreme Court of Rhode Island made in this cause from the date of filing the case to the date of the preparing of the transcript here requested.

7. Bond for costs, etc., on appeal to the Supreme Court of
[fol. 107] the United States.
8. Citation.
9. Order allowing appeal to the Supremé Court of the United States.
10. Statement of points to be relied on.
11. Acknowledgment of service by counsel for appellee.
12. This praecipe and proof of service thereof:

Dated at Brooklyn, New York, this — day of August, 1952.

Hayden C. Covington, 124 Columbia Heights, Brooklyn 2, New York, Counsel for Appellant.

[fol. 108] In Superior Court of State of Rhode Island

[Title omitted]

Certification of Clerk

I, John H. Greene, Jr., Clerk of the Supreme Court of the State of Rhode Island and Providence Plantations, hereby certify that the inclosed copies and documents listed either as Superior Court or Supreme Court papers are correct and conformed copies of the originals filed in the case of State of Rhode Island vs. William B. Fowler, Superior Court Criminal Appeal Number 31196, and Supreme Court Exceptions Number 9264. I further certify that the references and transcripts herein contained are accurate and correct transcriptions of the originals as filed and recorded. Appended hereto are the following documents:

(1) Notice Calling Appellees Attention to Rule 12.
(2) Acknowledgement of Service.
(3) Statement of Points Relied On.
(4) Praecipe for Transcript of Record.
(5) Citation.
(6) Order Allowing Appeal.
(7) Petition for Appeal, Statement, Assignments of Error and Prayer for Reversal.
(8) Statements as to Jurisdiction.
(9) Transcript of Testimony.
(10) Defendant's Bill of Exceptions.
(11) Bond.

(12) Stipulation that a Substantial Federal Question is Involved.

(13) Motion and Order for Stay of Execution of Judgment Pending Appeal to Supreme Court of United States.

(14) Advisory Opinion of the Supreme Court of Rhode Island.

(15) Final Opinion of the Supreme Court of Rhode Island.

John H. Greene, Jr., Clerk of the Supreme Court of the State of Rhode Island and Providence Plantations.

[fols. 109-110] [File endorsement omitted]

IN THE SUPREME COURT OF RHODE ISLAND

No. 9264

STATEMENT OF POINTS RELIED ON—Filed August 29, 1952

Comes now the above named appellant in the above entitled cause and states that the only point upon which he intends to rely in the Supreme Court of the United States in this cause is as follows:

The ordinance is unconstitutional because, both on its face and as construed and applied, it abridges the rights of freedom of assembly, freedom of speech, and freedom of worship, contrary to the First and Fourteenth Amendments to the United States Constitution and Sections 3, 10 and 21 of Article I of the Constitution of Rhode Island.

For the above reasons the judgment of the Supreme Court of Rhode Island should be reversed.

Hayden C. Covington, 124 Columbia Heights, Brooklyn 2, New York, Counsel for Appellant.

[fol. 111] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 340

[Title omitted]

DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed November 22, 1952

To the Clerk of the Court:

Now comes the appellant, pursuant to the requirements of paragraph 9 of Rule 13 of the Rules of this Court and designates the parts of the record which he thinks necessary for printing in the consideration of the case:

1. Bill of exceptions from the Superior Court of Rhode Island filed in this cause.
2. Final judgment of affirmance of the Supreme Court of Rhode Island.
3. Petition for appeal, statement, assignments of error and prayer for reversal.
4. All docket entries of Rhode Island Supreme Court.
5. Order allowing appeal.
6. Statement of points to be relied upon.
7. Order of this Court noting probable jurisdiction.
8. This designation of parts of record to be printed.

Dated at Brooklyn, New York, this 21st day of November, 1952.

Hayden C. Covington, Counsel for Appellant.

[fols. 112-113] Proof of Service (omitted in printing).

[fol. 114] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 340

ORDER NOTING PROBABLE JURISDICTION—November 10, 1952

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 340

WILLIAM B. FOWLER,

Appellant,

vs.

THE STATE OF RHODE ISLAND

APPEAL FROM THE SUPREME COURT OF THE STATE OF RHODE ISLAND

STATEMENT AS TO JURISDICTION

HAYDEN C. COVINGTON,
Counsel for Appellant.

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SUPREME COURT OF RHODE ISLAND

No. 9264

STATE

v.

WILLIAM B. FOWLER

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT AS TO JURISDICTION

Appellant files his statement discussing the basis upon which he contends that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question pursuant to Rule 12 (1) of the Rules of the Supreme Court of the United States, as amended April 6, 1942.

Opinion Below

The court below wrote an opinion which is not yet reported. The opinion of the Supreme Court of Rhode Island is made a part hereof, as Appendix A. An earlier opinion answering certified questions in this case appears at 83 Atl. 67. It is Appendix B.

Question Presented

Does the prohibition in the ordinance of holding a meeting for, and speaking in the park upon, a religious or political subject, both on its face and as construed and applied, a violation of the Federal Constitution because it amounts to a prohibition of the exercise or an illegal burden and abridgment of the appellant's rights of freedom of speech, assembly and worship guaranteed by the First and Fourteenth Amendments to the Constitution of the United States?

The question was raised by motion to quash and to dismiss filed in the Superior Court of New Hampshire. [4-5, 21, 55-56] [1] This question was adversely determined by the Supreme Court of Rhode Island. The entire opinion of the Supreme Court of Rhode Island is a part of this statement as to jurisdiction. See Appendix A and Appendix B at the end of this statement.

Statute Involved

This case draws into question the validity of an ordinance of the City of Pawtucket, duly enacted on August 17, 1916, Chapter 149, which provides as follows:

> "No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park."

The entire ordinance appears at the end of Appendix B at the close of this jurisdictional statement.

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[1] Numbers appearing herein within brackets refer to the pages of the stenographic report of the proceedings at the trial in Superior Court filed in the Supreme Court of Rhode Island.

Constitutional Provisions Involved

Section 10 of Article I of the Constitution of the United States, relied upon in this case, reads as follows:

> "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

The First Amendment, relied upon in this case, reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The pertinent part of the Fourteenth Amendment which appellant relies upon reads as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Matters Related to Jurisdiction

Timeliness

The judgment of the Supreme Court of Rhode Island affirming the judgment of the Superior Court was entered August 12, 1952. See Appendix A containing the opinion of the Supreme Court of Rhode Island. The judgment

affirming the judgment of the trial court, therefore, became final on August 12, 1952. This appeal is duly presented and filed within the 90-day time limit after the judgment became final. The appeal is timely.

Nature of Case

This is a criminal case. It is an appeal from a judgment affirming a judgment of conviction on an appeal trial *de novo* in the Superior Court. The appellant was first proceeded against in the District Court of Rhode Island, Tenth Judicial District at Pawtucket, by complaint. He was charged with violating the ordinance in question on September 3, 1950. The complaint and warrant, among other things, charged as follows:

> "On the 3rd day of September A. D. 1950, with force and arms, William B. Fowler alias John Doe laborer, of said Pawtucket, did violate Section 11 of Chapter 149 of the ordinances of the City of Pawtucket in that he did address a religious meeting in a public park, to wit; Slater Park against an Ordinance of the City of Pawtucket and against the Statute and the peace and dignity of the State."

How Constitutional Questions Raised

The constitutional question was raised in a motion to quash and in a motion to dismiss filed in the Superior Court of Rhode Island [4-5, 21, 55-56]. The question presented in that court was considered and overruled [58]. Each holding of the trial court was presented on appeal to the Supreme Court of Rhode Island and duly assigned as error. Each federal question presented upon this appeal also was presented to the Supreme Court of Rhode Island in the brief, on oral argument. See Appendix A and Appendix B of this statement as to jurisdiction.

Statutory Provisions Sustaining Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code or 28 U. S. C. 1257 (a).

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error. This case presents a state of facts within the jurisdiction of this court.

Statement of Case

The Proceedings

The appellant pleaded not guilty in the District Court. He was found guilty and fined. He appealed to the Superior Court. On the first hearing before the Superior Court of Rhode Island the case was reserved and at an earlier term transferred to the Supreme Court of Rhode Island. The parties there stipulated the facts. The Supreme Court of Rhode Island held that the ordinance was constitutional because the park was limited in its dedication and permissive use by the City of Pawtucket. 83 Atl. 2d 67.

The case was tried in the Superior Court following the opinion of the Supreme Court of Rhode Island. The appellant pleaded not guilty [5]. A jury trial was waived and the case was tried to the judge alone [5-6]. At the close of the evidence a motion for judgment of acquittal was made [21, 55-56]. On October 22, 1951, the court rendered a judgment convicting appellant [57]. He was fined $5.00 [58].

The Facts

It was stipulated that Slater Park in the City of Pawtucket has an area of approximately 194 acres; that within

the above area are located tennis courts, merry-go-round, bandstand, a lake with rental boats, a baseball field, swings and dandles for children, sixteen fireplaces, animal and bird compounds, extensive formal gardens, natural woodlands, and improved roads.

The parties further stipulated that there was sufficient space in the park for assemblies and that assemblies could be held without interfering with other activities carried on in the park [9].

In the summer of 1950 the local congregation of Jehovah's Witnesses at Pawtucket attempted to get permission to use Slater Park [22]. On application the official gave them a permit to use the park on two Sundays in August, 1950 [22, 25-26].

Appellant is a resident of Arlington, Massachusetts, and is a minister of Jehovah's Witnesses, duly ordained. He acts under the direction of the Watchtower Bible and Tract Society of Brooklyn, the legal governing body of Jehovah's Witnesses [31]. He was invited by the Pawtucket company of Jehovah's Witnesses to deliver a Bible discourse, as a visiting minister, to an assembly in Slater Park in Pawtucket on August 27, 1950 [32]. He accepted the invitation and came to the park in Pawtucket at the time appointed [33].

In Slater Park the congregation had assembled at a suitable place on the grass under the trees about one-half mile from the main entrance of the park. The assembly did not interfere with the use of the park by other persons [35-36]. About 400 persons were present in the assembly of which 250 were strangers who had been invited and 150 were Jehovah's witnesses who were members of the local congregation [38].

What occurred following the bringing of the assembly to order can best be told by the appellant himself. He said "The Pathway to Peace," was the title of his talk. Further

he testified: "after the assembly was brought to order I was introduced as the speaker of the occasion and began my speech, "The Pathway to Peace," I was using President Truman's talk as an illustration of the futility of men's efforts to establish peace by themselves. And then I launched forth into the scriptural evidence to show where we were on the string of time; that we had reached the end of this wicked system of things. . . . I had pointed out that it was a natural desire for all men to want peace; that they had desired that for centuries and they made strenuous efforts down through the centuries to obtain peace. They had failed and failed for an exceptionally good reason, too, and that today instead of peace we have fear and war, trouble and distress amongst the people. It was my purpose to point out from there on the principal reason why they failed, and at about that time I was, within the matter of seconds, surrounded by an impregnable wall of police officers. . . . and immediately Chief Hourigan, and in a very courteous manner, approached me and said to me, 'Mr. Fowler, have you a permit to give this talk?' I replied, 'Chief, you know very well that I need no permit to preach the Gospel.' I had previously informed him of that fact the week before in the police headquarters; that no nation on earth or city or government can issue a permit to Christians to do something God has commanded them to do, therefore, we need no permit to preach the Gospel. And he said then as he repeated, 'I am placing you under arrest for violation of this city ordinance,' and I was escorted very courteously to the police car, surrounded by police officers, and taken to headquarters. . . . I told these two gentlemen that I felt that they had very seriously interfered with the God given rights of Christians in America to exercise their freedom of speech in accordance with the Fourteenth Amendment of the United States Constitution; that we were not there for any evil purpose, but that they knew very well

we had come to that park for the purpose of doing good and, certainly, the people of Pawtucket need some good instructed into them as well as other cities and towns in the country, and that our sole mission was to exalt the name of the living God, Jehovah, and tell the people of Pawtucket that His kingdom was at hand; that that kingdom of righteousness is the only possible solution to the world's trouble and is soon to take over and put an end to this terrible condition. I said, 'You, gentlemen, instead of interfering with Jehovah's witnesses in doing this wonderful work, you should be co-operative with us instead of arresting me. You should have stayed at the park and seen that order was observed and that I was given an opportunity to tell the people of Pawtucket God's message.''

The Question Is Substantial

The question decided by the courts below in this case is identical to the question presented as to the validity of the construction of the ordinance in the companion case to this from New Hampshire, styled *Poulos* v. *State of New Hampshire.* See the statement as to jurisdiction in that case. Although the question was raised properly upon the appeal to the state courts in that case and was mentioned in the first opinion on certified questions, it was evaded on an inadequate procedural determination in the second opinion. The question there presented is whether the unwritten policy of the City Council of Portsmouth, New Hampshire, not to issue permits for the holding of religious meetings in the parks of the city was an abridgment of the rights guaranteed by the First and Fourteenth Amendments.

This Court is called upon to decide in this case whether the written policy expressed in an ordinance prohibiting the holding of religious and political meetings in the parks of Pawtucket is constitutional. In the New Hampshire case

there were provisions for a permit in the ordinance, which ordinance is valid on its face. The permit is denied in all cases where the application is for the holding of a religious meeting. In this case there is no provision for a permit at all. The policy of Pawtucket, Rhode Island, expressed in its ordinance prohibits completely the holding of a religious meeting or the giving of a religious talk in the parks of the city. As far as the inherent invalidity of the policy to prohibit the holding of religious meetings is concerned, it is the same in both cases.

The court below has, for the second time in this case, held that an ordinance which prohibits the holding of religious and political meetings and the giving of speeches on those subjects in public parks is constitutional.

The decision of the court flies in the teeth of the case of *Jamison* v. *Texas*, 318 U. S. 413. There the Court held invalid an ordinance that prohibited the distribution of literature. In this case the ordinance prohibits a meeting and the giving of a speech on two lawful and constitutional subjects in the park. There is no difference between the rights of freedom of press, speech, assembly and worship guaranteed by the First and Fourteenth Amendments against state abridgment. The distinction of the *Jamison* decision because freedom of the press was involved there and not freedom of speech, assembly and worship, as here, is a futile effort by the court below. The court missed the mark. It has failed to make a distinction. The attempted distinction is a distinction without a difference which must be corrected by the Court.

The Court in the *Jamison* case, *supra*, held that an ordinance which prohibited the exercise of constitutional rights on the streets was void. The ordinance in this case prohibits the exercise of such liberties in the park. There is no distinction between prohibition of the exercise of rights on

the streets and in the parks. The fact that literature rather than speech was involved in the *Jamison* case is immaterial. The right of free speech is as strong as the right of free press. Neither can be prohibited as is done by the ordinance in this case.

In *Commonwealth* v. *Gilfedder*, 321 Mass. 335, 73 N. E. 2d 241, the Supreme Judicial Court said that, "Some of these decisions relate to the distribution of printed matter in streets and ways, but it seems plain that in respect to general principles no distinction can be drawn between the right to distribute printed matter and the right of public speech or between the exercise of those rights in public streets and their exercise in public parks."

The court below relied heavily on *Davis* v. *Massachusetts*, 167 U. S. 43. This Court's attention is called to the decision in the *Gilfedder* case, *supra*, where the Supreme Judicial Court of Massachusetts, among other things, said:

"A series of recent decisions by the Supreme Court of the United States has, as we read the cases, established the proposition that the exercise of these rights cannot be wholly precluded in public places such as streets and parks by sweeping general prohibitions and cannot be subjected to the requirement of permits the granting of which is not governed by binding rules adequate to insure the exercise of the rights under reasonable conditions. Perhaps the most completely in point of these decisions are *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147 (reversing *Commonwealth* v. *Nichols*, 301 Mass. 584); *Jamison* v. *Texas*, 318 U. S. 413, and *Tucker* v. *Texas*, 326 U. S. 517. Pertinent also in some aspects are *Lovell* v. *Griffin*, 303 U. S. 444; *Thornhill* v. *Alabama*, 310 U. S. 88; *Carlson* v. *California*, 310 U. S. 106; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Largent* v. *Texas*, 318 U. S. 418; *Murdock* v. *Pennsylvania*, 319 U. S. 105;

Martin v. *Struthers*, 319 U. S. 141, and *Thomas* v. *Collins*, 323 U. S. 516" (321 Mass. 335, 73 N. E. 2d 241).

In commenting on the decision by the Supreme Court in *Davis* v. *Massachusetts*, the court continued:

"The Commonwealth presses upon us the cases of *Commonwealth* v. *Davis*, 162 Mass. 510 (affirmed sub nomine *Davis* v. *Massachusetts*, 167 U. S. 43), and asks us to follow these decisions, while the defendants ask us to overrule them. These cases also turned upon the validity of ordinances forbidding public addresses upon Boston Common without a permit. We confess to difficulty in reconciling the present decision with the decisions in the *Davis* cases. Nevertheless, we feel compelled to the result now reached by the broad sweep of principles set forth in great amplitude in more recent decisions of the Supreme Court of the United States. That court in *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, at page 515, while seemingly doubting *Davis* v. *Massachusetts*, 167 U. S. 43, nevertheless distinguishes that case on the ground, as we understand the opinion, that the ordinance in the *Davis* case was not directed solely at the exercise of the rights of speech and assembly, but was addressed as well to other activities that could constitutionally be prohibited."

Mr. Justice Frankfurter, commenting on *Davis* v. *Massachusetts*, 167 U. S. 43, in his concurring opinion in *Niemotko* v. *Maryland*, 340 U. S. at page 279, said, among other things:

"An attempt to derive from *dicta* in the *Davis* case the right of a city to exercise any power over its parks, however arbitrary or discriminatory, was rejected in *Hague* v. *C. I. O.*, *supra*."

Davis v. *Massachusetts*, 167 U. S. 43, involved a law which required a permit before a speech could be made in the Boston Common. The same decision was relied upon by the state in *Jamison* v. *Texas*, 318 U. S. 413. The unanimous court said: "It relies primarily on *Commonwealth* v. *Davis*, 167 U. S. 43. This same argument made in reliance upon the same decision has been directly rejected by this Court. . . . Here, the ordinance as construed and applied prohibits the dissemination of information by handbills. As such, it cannot be sustained."

There are other reasons why *Davis* v. *Massachusetts*, 167 U. S. 43, should not be relied upon. They were urged to the court below by the appellant when the certified questions were argued. The contention was succinctly stated by Mr. Justice Baker in his opinion, which was concurred in by Mr. Justice Capotosto. See *State* v. *Fowler*, 83 Atl. 2d 67; Appendix B herein. Among other things he said: "Also in my opinion *Davis* v. *Massachusetts*, 167 U. S. 43, upon which the majority of the court relies, cannot properly be held to govern the instant case. While it is true that the above-cited case has never been specifically overruled by the Supreme Court of the United States, nevertheless in my judgment that court, in later decisions where it referred to the *Davis* case, has so weakened its effect as an authority that I am unable to accept it as controlling here. Among such decisions are *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496; *Jamison* v. *Texas*, 318 U. S. 413; *Saia* v. *New York*, 334 U. S. 558, and *Niemotko* v. *State of Maryland*, 19 Law Week 4095 [340 U. S. 268]. See also *Milwaukee County* v. *Carter*, 258 Wis. 139, a recent opinion of a state court of last resort. Several of these cases involve the right of free speech in public parks. The general principles of law applicable to the right of freedom of speech and assembly under the first and fourteenth amendments of the

constitution of the United States, as set out in such cases and in others, are in substance inconsistent with and contrary to the holding in the *Davis* case.

"In addition it may be noted that in *Commonwealth* v. *Filfedder*, 321 Mass. 335 (1947), the supreme court of that state, in a case involving the right to make an address on Boston Common contrary to an ordinance of that city and certain rules of the board of park commissioners, held such ordinance and rules to be in conflict with the rights of freedom of speech, of the press, and of assembly guaranteed by the first amendment to the constitution of the United States. At page 342 of that opinion the court makes the following comment: 'We confess to difficulty in reconciling the present decision with the decisions in the *Davis* cases. Nevertheless, we feel compelled to the result now reached by the broad sweep of principles set forth in great amplitude in more recent decisions of the Supreme Court of the United States.'"

The Supreme Court of New Hampshire in *State* v. *Derrickson*, 97 N. H. 91, 81 Atl. 2d 312, said: "At this juncture it is important to state that in sustaining the Portsmouth ordinance no reliance is placed on *Davis* v. *Massachusetts*, 167 U. S. 43, which is believed to have been so eroded by the force of time and recent decisions as to be valueless as a binding precedent."

Public parks have from time immemorial been used as places of public assembly and delivery of speeches of all kinds upon innumerable occasions (*Hague* v. *C. I. O.*, 307 U. S. 496; *Schneider* v. *New Jersey*, 308 U. S. 147; *Jamison* v. *Texas*, 318 U. S. 413; *Saia* v. *New York*, 334 U. S. 558; *Niemotko* v. *Maryland*, 340 U. S. 268), and, contrary to the holding of the court below, "one is not to have the exercise of his liberty of expression in appropriate places abridged

on the plea that it may be exercised in some other place." *Schneider* v. *New Jersey*, 308 U. S. 147, 163.

Appellant in this case stands squarely on all the holdings of this Court declaring that ordinances forbidding the holding of public assemblies in parks and the use of public streets for the purpose of preaching the Gospel are void and unconstitutional. The holding here should be the same as the holding in those cases.

While the court below did not say that the city had the right to keep religious groups out of the parks of Pawtucket under the doctrine of separation of church and state, such doctrine may be considered by this Court in this case. The point was presented in *Niemotko* v. *Maryland*, 340 U. S. 268, but not decided. See 340 U. S. at pages 272-273. It is believed that the question now is clearly presented by the ordinance in this case and must be determined here and now. It is submitted that the case here is controlled by *Zorach* v. *Clauson*, 72 S. Ct. 679 and that *McCollum* v. *Board of Education*, 333 U. S. 203 does not apply.

The position here taken on the lack of constitutional authority in the City of Pawtucket to exclude religious meetings and to prohibit religious talks in the parks of the city is directly supported by *County of Milwaukee* v. *Carter*, 258 Wis. 139, 45 N. W. 2d 90. In that case the ordinance was identical to the one involved here. In that case the facts were the same as those in this case. It involved the holding of a meeting by Jehovah's witnesses in Lake Shore Park in Milwaukee. The court said:

"When, in Article I, Section 3, the Wisconsin Constitution guarantees the right of free speech it does not except or restrict speech on the subject of religion and, if it should, such restriction would be void because in conflict with and subordinate to the First and Fourteenth Amendments of the United States Constitution, which neither make nor

recognize any such limitation. Speech on religious topics is just as free, and no freer, under the constitution as speech on other subjects and on no subject is it free from reasonable regulation to insure public order and safety and to reconcile the exercise of this right with the simultaneous enjoyment of equally sacred rights by others. The Milwaukee County ordinance purports not to regulate but to prohibit speech in public parks on political as well as religious subjects. Section 47.02(7) provides: 'No sermon, discussion, harangue or speech shall be delivered by any person for political purposes or in connection with the sale of any article or which shall constitute a public criticism or abuse of any religious organization or representative thereof.' Government may, in the interests of public order, safety, and the equitable sharing of facilities, exercise reasonable control over when, where and under what conditions public meetings may be held on public property, but to deny to the people all use of the people's property for the public discussion of specified subjects is an unconstitutional interference of rights expressly guaranteed by both state and federal constitutions. Relying entirely on the facts which this record presents, it appears that Milwaukee county's ordinance is void, as in conflict with both constitutions, and the conviction under it is likewise void and must be set aside."

The constitutional prohibition of joinder of church and state is not controlling here. If a public park dedicated by law and regulation to community purposes by the state cannot be so used by a religious group, then by force of the same reason the public streets could be kept back from use by such religious group. The doctrine of separation of church and state ordained in the First Amendment should not be distorted so as to itself become an abridgment of liberty. It would result in just that if the construction contended by the state is accepted here. Since public streets

cannot be withheld from religious organizations for exercise of their constitutional rights of free speech, then by force of the same reason public parks that are open for community metings may be used and cannot be denied to such groups for public meeting purposes.

The contention made by the state and the Supreme Court of Rhode Island in this case that the use of the public park for the public meeting and the delivery of the talk is a violation of the Constitution because it is appropriation of public funds should not be considered seriously. The appropriation is such a slight and inconsequential appropriation as to be unworthy of notice. The doctrine of *de minimis* applies here.

The Court is referred to many cases involving use of public schools for religious assemblies where the rule of *de minimis* has been applied. The identical argument that has been made here by the state was made in those cases. In the decisions, various state courts have held that the use of the school for religious assemblies at times when the school buildings are not used for school purposes is not sectarian use in violation of the Constitution. These holdings were made in decisions rendered prior to the passage of the "Civic Center Acts", which permitted the use of the schools for such purposes throughout the country. See *Nichols* v. *School Directors*, 93 Ill. 61; *School Directors* v. *Toll*, 149 Ill. App. 541; *Hurd* v. *Walters*, 48 Ind. 148; *Baggerly* v. *Lee*, 37 Ind. App. 139, 73 N. E. 921; *Townsend* v. *Hagan*, 35 Iowa 194; *Davis* v. *Boget*, 50 Iowa 11; *Gibbert* v. *Dilley*, 95 Neb. 527, 145 N. W. 999; *Greenbanks* v. *Bantwell*, 43 Vt. 207; *Lagow* v. *Hill*, 238 Ill. 428, 87 N. W. 369.

The use of the school building as an assembly place for racial and religious groups under statutes permitting school trustees to permit the use of school houses, when not in use for school purposes for meetings, entertainments, and occa-

sions where admission fees are charged, if such meetings or entertainments are not under exclusive control and proceeds are not applied for the benefit of a religious sect or denomination or a fraternal or exclusive society, was held not to be unlawful in *Lewis* v. *Board of Education*, 157 Misc. 520, 285 N. Y. S. 164 (modified in other respects in 247 App. Div. 106, 286 N. Y. S. 751, appeal dismissed 270 N. Y. 490, 12 N. E. 2d 172). The court said:

"The manifest vice of the plaintiff's position is that he has confused the racial and religious affiliations of the users of the school buildings with the purpose for which the buildings are used. The restrictions relate to the use. . . . Rather than inimical to the educational policy of the State, or subversive of legitimate use, it is a wholesome thing to have the school buildings, which are maintained at large expense by the taxpayers, used for the purposes and by the groups whose exclusion is here sought. It is the use to which the school buildings are put, and not the identity of the users, that is decisive of the lawfulness of the use."

In *Nichols* v. *School Directors*, 93 Ill. 61, 34 Am. Rep. 160 (1879), it was held that a statute authorizing the directors to grant the temporary use of a schoolhouse, when not occupied by school, for religious meetings, and for such other meetings as the directors might deem proper, and the act of a school district in granting the use of a schoolhouse for religious meetings, was authorized, and did not contravene a constitutional provision that no person should be required to support a place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship, or a provision which forbade any school district from making an appropriation in aid of any church, or for sectarian purposes, or a provision which required all school property to be faithfully applied to the

object for which such gifts or grants were made. The court said:

"It seems to us a very strained interpretation to attempt to bring the present case within the reach of either one of the above constitutional provisions. The latter one relates to the subject of a gift or grant, which this schoolhouse is not shown to be, and if it were, it is not perceived wherein an incidental use of the house for the holding of religious meetings, not in any way interfering with school purposes, would in any reasonable sense be inconsistent with its faithful application to the object of the gift or grant. The second provision respects the making of an appropriation or payment from some public fund in aid of any church or sectarian purpose, and it cannot be claimed that this contemplated use of the schoolhouse is such. In what manner, from the holding of religious meetings in the schoolhouse, complainant is going to be compelled to aid in furnishing a house of worship and for holding religious meetings, as he complains in his bill, he does not show. We can only imagine that possibly at some future time he might, as a taxpayer, be made to contribute to the expense of repairs, rendered necessary from wear and use of the building in the holding of religious meetings. A single holding of a religious meeting in the schoolhouse might in that way cause damage in some degree to the building, upon the idea that continued dripping wears away stone, but the injury would be inappreciable. As respects any individual pecuniary expense which might be in this way involved, we think that consideration may be properly disposed of under the maxim, 'De minimis,' etc. The things contemplated by the constitutional provision first above named was a prohibition upon the legislature to pass any law by which a person should be compelled, without his consent, to contribute to the support of any ministry or place of worship. Such a

matter as the subject of complaint here, we do not regard as within its purview. Religions and religious worship are not so placed under the ban of the Constitution that they may not be allowed to become the recipient of any incidental benefit whatsoever from the public bodies or authorities of the state. That instrument itself contains a provision authorizing the legislature to exempt property used for religious purposes from taxation; and in that manner the indirect supporting of places of worship. In the respect of the possibility of enhanced taxation therefrom, this provision of the Constitution itself is even more obnoxious to objection than this permission given by the school directors to hold religious meetings in the schoolhouse. There is no pretense that it is in any way an interference with the occupation of the building for school purposes" (93 Ill. 61, 34 Am. Rep. 160).

The doctrine of *de minimis* was followed in *State ex rel. Conway* v. *District Board,* 162 Wis. 482, 156 N. W. 477. In that case it was held that the offering of a prayer by a Catholic priest or protestant minister at a public school graduation exercise is not sectarian instruction in violation of the Constitution.

The doctrine of *de minimis* should be applied here. It was applied by the Court in *Everson* v. *Board of Education,* 330 U. S. 1, with which compare *Costigan* v. *Hall,* 249 Wis. 94, 23 N. W. 2d 495 and *State ex rel. Van Straten* v. *Milquet,* 180 Wis. 109, 192 N. W. 392. See also "Separation of Church and State in the United States" (1950 Wis. L. Rev. No. 3, pp. 452-453, 455) and "Due Process and Disestablishment" (62 Harv. L. Rev. No. 8, pp. 1343-1344).

The United States Constitution guarantees freedom of assembly. No exception of religious assembly was written into the Constitution. If the framers of the Constitution intended to exclude religious assembly from the protection

written into the First Amendment, they would have written the exemption into the Amendment. It is absolutely not permitted for a state or city, or their officials, executive, legislative or judicial, to amend the First Amendment by writing into it an exemption or exception which does not appear in the plain language contained in the amendment. If the freedom-of-assembly guaranty in the First Amendment makes secure the right to hold meetings of other kinds in a public park, it likewise makes secure the right to hold religious meetings therein.

The doctrine of separation of church and state ought properly to be limited to the boundaries fixed by the framers of the First Amendment. What the authors had in mind was the prohibition of a state church; they intended to exclude any religion from being aided or supported by public funds. The authors of the Amendment did not intend to exclude religion from the benefits of freedom of speech and assembly provided for in the first Amendment. In fact, it has been declared that religion occupies a favored position in the law. It is a well-known fact that the states have explicitly provided that places of public worship shall be exempt from taxation. The Supreme Court of the United States has declared that this is a Christian nation. *Holy Trinity Church* v. *United States*, 143 U. S. 457, 471.

It would be unreasonable to suppose or to contend that the framers of the First Amendment had in mind discriminating against the religious organizations in holding public assemblies. The interpretation of the First Amendment contended for by the state requires this Court to discriminate against religious and political assemblies in favor of all other types of assemblies. This Court should not write into the First Amendment a discrimination against religious assemblies under the guise of the sophisticated doctrine which is an unlawful stretching of the

principle of the separation of church and state. A factitious conclusion would be reached by so doing, which is forbidden by the Constitution. Indeed religious organizations would be discriminated against and the Court would thus misinterpret the guaranty of freedom of assembly appearing in the First Amendment.

There has been no appropriation of Slater Park by Jehovah's witnesses. They have not excluded other organizations from the use of the park. Their use of the park is only incidental and synchronizes with the use of the park by all other organizations in Pawtucket for recreational and other purposes. The so-called appropriation of public funds for a religious use by use of the park for holding religious services is so slight and inconsequential and incidental as to be unworthy of notice by this Court in considering the so-called applicability of the doctrine of separation of church and state.

It is respectfully submitted that the proper holding by this Court should be that religious assemblies stand on the same strong basis under the First Amendment as do assemblies by any other group for any other purpose in a public park. This Court should hold that the use of the park for a religious service is proper and within the strong protecting shield of the First Amendment. The Court should conclude that the ordinance, on its face and as enforced and construed by the City of Pawtucket, abridges the rights of the appellant to freedom of speech, assembly, worship and conscience, contrary to the First and Fourteenth Amendments to the United States Constitution.

The court below unlawfully injects the use of the sound device into the question to be decided in this case. That element is entirely irrelevant. There was no objection to the use of the sound device at any time. The arresting officer testified that it was a lawful and peaceful use of the park, except for the fact that a religious meeting was pro-

hibited. [15-16] The complaint did not charge appellant with unlawfully using a sound device. It charged him with addressing a religious assembly contrary to the provisions of the ordinance. The ordinance does not deal with the use of sound devices.

This Court has frequently held that abuses of the exercise of the right do not justify laws which prohibit or censor the exercise of the right itself. To be valid an ordinance punishing for the use of a sound device in a loud and raucous manner must deal with the abuse of the use and not censor or prohibit the use. Compare *Kovacs* v. *Cooper*, 336 U. S. 77 with *Saia* v. *New York*, 334 U. S. 558. The court below did not have a narrowly drawn zoning ordinance like the Pennsylvania courts had in *Commonwealth of Pennsylvania* v. *Geuss*, 168 Pa. Super. 22, 76 Atl. 2d 500 and 368 Pa. 290, 81 Atl. 2d 522, appeal dismissed *sub nomine Geuss* v. *Pennsylvania*, 342 U. S. 912, which is cited and relied upon by the court below.

There was not an attempt to zone the parks of Pawtucket so as to prohibit a religious meeting in this particular park. The ordinance here prohibited religious and political meetings in all parks of the city. There were no parks anywhere in the city where a religious or political meeting could be held. Such meetings were banned in all public parks in the city.

The court below implies that the City of Pawtucket had limited the dedication of the park. It is said, however, that Slater park "has been maintained as a public park". Being a public park, it was open for all park purposes (including religious and political speeches) in the absence of a specific limitation in the deed to the city or a restricted dedication confining the use to recreation and rest and excluding religious and political meetings. Since there has been no such limitation as a matter of fact it cannot be grafted on to the use of the public park by judicial amend-

ment of the facts. This ruling amounted to an ex post facto law.

A patent inconsistency appears on the face of the opinion of the court below in a statement made which also is contradicted by the facts in the case. The court says that a person using the park for recreation is entitled not to have another person destroy his "rights to use the park for its dedicated purposes of rest and recreation." In the first part of the opinion the court stated that a mere assembly could be held "without unduly interfering with the use of the park by others." It was stipulated in this case that there was space in the park "for assemblies of these kinds and that assemblies can be held without interfering with these other activities." [9-10] The undisputed testimony of the appellant was that the holding of the assembly was at a place in the park where it did not interefere with the other uses of the park by other persons at the same time. He also testified that the group he spoke to was out of sight of any other group using the park for other purposes. [33-36]

The interference of the use of the park by other persons was a fact that had to be proved by the prosecution. There was no such proof received. There is no inference that can be drawn from the testimony that the holding of the assembly and the giving of the talk by the appellant in any way interfered with the use of the park by others. Since the state failed to prove that the use of the park interfered with the rights of others, it is beyond the constitutional authority of the court to find or infer that the use did interfere with the other uses of the park. See *Busey* v. *District of Columbia*, 78 App. D. C. 189, 138 F. 2d 592 at page 595; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639; *Thomas* v. *Collins*, 326 U. S. 516, 529-530; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-153. The use of the sound device to address

the 400 persons in the audience did not *per se* constitute interference with the rights of others in the park who were not attending the assembly. *Saia* v. *New York,* 334 U. S. 558.

The vehicle used by the court below collided head-on with the standing decisions of this Court, when that court held that a prohibitory ordinance was regulatory. Regulation is confined to time, place and manner of the exercise of the right. *Schneider* v. *New Jersey,* 308 U. S. 147; *Cantwell* v. *Connecticut,* 310 U. S. 296. An outright prohibition of the exercise of the right is not regulation. Laws prohibiting the exercise of the rights guaranteed by the Constitution are not valid. Mr. Justice Reed for a majority of the Court in the defunct decision styled *Jones* v. *Opelika,* 316 U. S. 584, said: "Ordinances absolutely prohibiting the exercise of the right to disseminate information are, *a fortiori,* invalid." (316 U. S. at pages 595-596) This case was reversed in 319 U. S. 103, but this particular holding was not.

Prohibition is regulation only when the ordinance deals with the abuse of the exercise of the right. *Kovacs* v. *Cooper,* 336 U. S. 77, is an example of this. There, without reversing *Saia* v. *New York,* 334 U. S. 558, the Court held valid a law which prohibited loud and raucous noises emitted from a sound device on the streets. The ordinance here is not narrowly drawn so as to prohibit an abuse of holding assemblies and giving religious and political talks in a public park. There is no abuse shown. It was not contended in this case that there was an abuse of the right.

The state and the court below are confronted with a record where it is stipulated that the assembly was peaceful and lawful in all respects save and except for the fact that

it was a religious assembly and a religious talk was given to the group in violation of the ordinance.

The court below also struck a discordant legal note. The symphony in the field of civil liberties was marred in the holding that it was necessary to find beyond a reasonable doubt that the ordinance was unconstitutional. It is submitted that in the case of civil liberties guaranteed by the First Amendment there is no presumption of validity but there is a presumption of invalidity unless the state claiming the right to abridge those liberties, shows to the satisfaction of the court that the ordinance is valid. (*Busey* v. *District of Columbia,* 78 App. D. C. 189, 138 F. 2d 592, 595; *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624; *Thomas* v. *Collins,* 326 U. S. 516, 526-530; *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152-153.)

Conclusion

Appellant prays that the Court note jurisdiction of this cause for final hearing upon the question involved in accordance with the rules of the Court, because the court below has disposed of an important and substantial federal question in a way that is in conflict with the Constitution of the United States, and has so radically and far departed from the Constitution of the United States and the accepted sound course of judicial procedure as to call for exercise by the Supreme Court of the United States of its power of supervision and review to halt the same.

Respectfully submitted,

HAYDEN C. COVINGTON,
124 Columbia Heights
Brooklyn 2, New York
Counsel for Appellant.

APPENDIX A

SUPREME COURT

Ex. &c. No. 9264.

STATE

v.

WILLIAM B. FOWLER

OPINION

FLYNN, *C. J.*:

This is a criminal complaint charging the defendant with violating section 11 of chapter 149 of the ordinances of the city of Pawtucket by making an address to a religious meeting in a public park owned and maintained by that city. The case was tried first in the tenth judicial district court and following defendant's conviction and sentence he duly appealed to the superior court. However, before trial and by leave of court defendant filed a motion to quash the complaint. Thereupon the superior court certified to this court for determination, in accordance with general laws 1938, chapter 545, § 6, as amended by public laws 1940, chap. 941, sec. 2, certain questions of doubt and importance as to the constitutionality of the ordinance.

Upon consideration thereof we held in substance that the ordinance on its face was not designed to interfere with defendant's rights of freedom of speech, or of assembly, or of religion; that it was part of a regulatory and nondiscriminatory ordinance which was enacted many years ago to secure the maximum reasonable and orderly use of the park by the public for rest and recreation; that in effect it was similar in purpose and principle to the one which was involved in the case of *Davis* v. *Massachusetts*, 167 U. S. 43; that, since the unequivocal statement of law in the *Davis* case had not been overruled by the United States Supreme Court, we could not say beyond a reasonable doubt that the ordinance here was unconstitutional and in violation of the first and fourteenth amendments to the United States

constitution; and further that it did not violate similar guaranties of such rights in the constitution of this state. *State* v. *Fowler*, R. I. , 83 A. 2d 67.

Accordingly the case was remitted to the superior court where, after a trial *de novo* in which jury trial was specifically waived, defendant was convicted and sentenced to pay a fine of $5 and costs. Thereupon he duly prosecuted his bill of four exceptions to this court, but only the first, second and fourth are now being pressed. The third, being neither briefed nor argued, is deemed to be waived under our practice.

The evidence is either admitted or not disputed. The defendant is a resident of Arlington, Massachusetts, and is a minister of the group known as Jehovah's witnesses. He was invited by the local or Pawtucket members of such group to deliver a bible discourse to their assembly to be held in Slater Park on September 3, 1950. The city of Pawtucket owns that park, which has an area of approximately 194 acres and is situated in the residential section of the city. For a great many years it has been maintained as a public park having a variety of facilities for rest and recreation. These range generally from tennis courts to formal gardens. The mere assembly of a group of people, excluding, however, any public address with or without the aid of a sound-magnifying device, could be held without unduly interfering with the use of the park by others.

From 1916 to date use of the park has been regulated in the public interest, by the ordinance in question and a nondiscriminatory administration thereof. That ordinance, chapter 149, contains sixteen sections, many of which are unrelated to the exercise of constitutional rights. It appears in full as an appendix to our previous opinion in this case, to which reference is hereby made. *State* v. *Fowler*, *supra*. Section 11 thereof, which is at the base of the instant controversy, reads as follows: "No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park."

The local members of the group had received permission previously to hold religious assemblies and had used the park for such purposes on two preceding Sundays. However, contrary to the express terms of the ordinance, defendant on September 3, 1950 began to address about 400 persons who had assembled there for a religious meeting. Approximately 150 of the assembly constituted members of the religious group and the other 250 were strangers who had come as invitees to such meeting. The latter probably were not residents of the city.

It is not disputed that defendant began to address the meeting with the aid of a microphone and *two* "loud speaker" devices; that he thus proceeded with his address sufficiently to define its religious character before interruption by the police; and that the address as made was admittedly contrary to the literal provisions of the ordinance. After being interrupted politely by the police, defendant was invited to go to the police station where the instant complaint was sworn out and the warrant was issued for his arrest. There is no question of intimidation, excessive force or lack of courtesy on the part of the police before, during or after the meeting. The contrary is admitted.

When the trial was about to commence defendant, with permission of the superior court, made a motion to quash, orally and in writing, on the grounds that the ordinance on its face and as construed and applied is unconstitutional in that it abridges the rights of defendant to freedom of speech, freedom of assembly and freedom of worship, contrary to the provisions of the first and fourteenth amendments to the constitution of the United States and to the provisions of sections 3, 10, and 21 of article I of the constitution of Rhode Island. This motion was denied and is the subject of defendant's first exception.

The defendant concedes in his brief and argument that such motion is based on the identical grounds and raises the same constitutional questions as those involved in the certification which was decided by this court in *State* v. *Fowler*, *supra*. However, he insists that in such opinion we have misconceived the applicable law and have failed to follow the mandate laid down by the United States Supreme Court in many cases which he again cites; and that we have

erroneously relied upon the *Davis* case which is either not the law or not in point. Especially he now emphasizes the cases of *Jamison* v. *Texas*, 318 U. S. 413, and *Commonwealth* v. *Gilfedder*, 321 Mass. 335, to show that the earlier case of *Davis* v. *Massachusetts*, *supra*, is no longer the applicable law of the United States in the circumstances here.

In view of the strong argument on this point we have re-examined the many cited cases but we fail to find wherein any of them lays down an express mandate requiring a different conclusion from the one which we reached and expressed previously on the basis of the pertinent law unanimously enunciated by the United States Supreme Court in the *Davis* case. In our judgment that case concerned an ordinance which in substance and effect is similar in principle and purpose to that involved in the instant case. It was part of a general ordinance designed to control and regulate a common or park which was owned by the state or city and was maintained for the general convenience and comfortable use of the public as a whole. Likewise as part of the regulation it permitted in practical effect what amounted to a prohibition of all religious and political addresses to assemblies in that public common or park, much as we have expressly in the ordinance under consideration herein.

Consequently the *Davis* case is clearly distinguishable from *Jamison* v. *Texas*, *supra*, which is relied on by defendant. There, among other provisions, the ordinance made it unlawful "to scatter or throw any handbills, circulars, cards, newspapers or any advertising device of any description, along or upon any street or sidewalk in the city of Dallas." Nothing in that ordinance purported to make it unlawful *to distribute* religious pamphlets, and yet the gravamen of the complaint there, as viewed from the evidence, was directed *solely* to the defendant's distribution of religious treatises which had on the back a reference to a book which could be purchased if desired. Therefore on the face of the ordinance and on the facts that case is different from the *Davis* case.

Moreover the ordinance in *Jamison* v. *Texas*, *supra*, differs still further from the one in the instant case in that the ordinance here expressly recognizes the right of re-

ligious groups to assemble and nowhere makes it unlawful to distribute religious pamphlets or to hold religious meetings and services. Therefore the *Jamison* case does not appear to us to carry any mandate, express or implied, that is applicable to the ordinance and facts of either the *Davis* case or the one now before this court.

It will serve no useful purpose to repeat what was said previously in our opinion on the certification concerning the numerous cases relied on by defendant, except perhaps to observe that we find it difficult to determine precisely which of the principles of law as stated in certain of the main opinions are actually concurred in by a majority of the justices of the United States Supreme Court. Likewise in those cases it becomes hard to know, in view of language in the several concurring and dissenting opinions, to what extent some statements of law in the main opinions may have been restricted or inferentially overruled in later cases.

We may again point out, however, that in the *Davis* case the supreme judicial court of Massachusetts unanimously and unequivocally stated the law applicable to the right of an individual member of the public to use a park or common that is maintained and regulated by the state or municipality for use by the public as a whole, and that such statement of the law was expressly approved and incorporated as part of the opinion of the United States supreme court in *Davis* v. *Massachusetts, supra.*

Further the Supreme Court of the United States added thereto the following statement of the law which was unanimously concurred in: "It is, therefore, conclusively determined there was no right in the plaintiff in error to use the common *except in such mode and subject to such regulations as the legislature in its wisdom may have deemed proper to prescribe.* The Fourteenth Amendment to the Constitution of the United States does not destroy the power of the States to enact police regulations as to the subjects within their control * * * *and does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the constitution and laws of the State.*" (Italics ours.)

That case, though frequently cited to the Supreme Court of the United States, has not been expressly overruled by that Court. On the contrary it has been distinguished in some form from cases in which it was cited. Ordinarily a court does not distinguish one of its own cases if it really intends to overrule it and to hold that such case no longer states properly the applicable law of that jurisdiction. Moreover it is reasonable to expect that if and when the United States Supreme Court actually intends to overrule the express statements of law in the *Davis* case, it will reserve to itself the right to do so in equally unmistakable language for the guidance of other courts which must conform to that Court's decisions.

But the defendant nevertheless argues that the *Davis* case has been nullified and in effect overruled by implications to be gathered from statements in certain of the cases decided by the United States Supreme Court and discussed in our former opinion. He urges that the decision of the supreme judicial court of Massachusetts in the case of *Commonwealth* v. *Gilfedder, supra,* shows a proper conception of the effect of those decisions and states the law presently governing cases of this kind. Apparently the Massachusetts court in that case did not adhere to the law previously stated by it in the *Davis* case, which had unanimous approval by the United States Supreme Court.

It is significant, however, that the Massachusetts court did not overrule its own decision in the *Davis* case and expressly conceded that it could not find a case where the Supreme Court of the United States had overruled its approval of that case. Furthermore it may be noted that the supreme judicial court of Massachusetts appears to have applied elsewhere, with reference to a certain decision of the United States Supreme Court, the principle that any change by way of extension in the ruling of the case then under consideration "must come from the court which first pronounced that doctrine." *Sherrer* v. *Sherrer,* 320 Mass. 351, 359. We agree with that pronouncement. By analogy here, if the explicit ruling of law in *Davis* v. *Commonwealth,* 167 U. S. 43, is to be overruled, it should come only from the United States Supreme Court.

At any rate the difficulty which we have with the procedure indicated by that opinion is twofold. We are bound to follow the Supreme Court of the United States in its decisions relating to the law governing the United States Constitution. But we are not bound necessarily by another state court's interpretation of or implications from the decisions of the United States Supreme Court. Secondly, we cannot believe it to be a sound constitutional principle to leave the law applicable to the United States constitution to broad implications drawn generally by state courts from opinions of the United States Supreme Court. Conceivably on such a basis there could be forty-eight different deductions or inferences as to what each state court thought a decision of the United States Supreme Court really meant and as to the limitation, if any, on the exercise of such a constitutional right which, according to a particular state court's deduction, had the concurrence of a majority of the United States Supreme Court. In our judgment that is not a desirable or helpful substitute for an authoritative and objective guide which the state courts are expected to follow in such important determinations.

On the other hand, if such a practice were to be adopted, then even if all state courts were in agreement on a particular conclusion deduced inferentially from language in certain opinions of the United States Supreme Court, the latter, which alone has the sole prerogative of determining questions relating to the United States constitution, might well say that a majority of that court had never overruled the *Davis* case; that such case had always been distinguished without intending to overrule it; and that it still is applicable law in the type of case where the question involves only the defendant's right, as a member of the public, to speak in a manner and under conditions which would violate the equal and correlative rights of other members of the public to a reasonable use of the park for its dedicated purpose. In our judgment, for all that appears in the cases thus referred to by the defendant and discussed in our previous opinion, there is nothing which would prevent such conclusions by the United States Supreme Court.

In that connection it is interesting to note the case of

Commonwealth of Pennsylvania v. *Geuss*, 168 Pa. St. 22, which was affirmed by the supreme court of Pennsylvania in 368 Pa. 290, and in which certiorari was denied by the United States Supreme Court since the argument herein. *Geuss* v. *Pennsylvania*, 342 U. S. 912. There the supreme court apparently did not feel constrained to interpret in the manner urged by defendant here the statements of principles appearing in certain opinions of the United States Supreme Court. The Pennsylvania supreme court did not read such opinions as compelling a conclusion that an ordinance must be invalid if, as part of a reasonable regulation, it purports to prohibit an individual from exercising a constitutional right of freedom of speech in a public place. While that case involved an ordinance prohibiting the use of sound trucks on public highways, whereas here we have the use of two "loud speakers" in a small public park in a residential section of the city, yet the underlying principle of prohibiting a constitutional right as part of a reasonable regulation in the public interest is analogous to the regulation in the ordinance as construed and applied in the instant case.

Further, defendant's claim leads to discrimination. It would create in him, as one member of the public, a paramount right whereby he may insist not only that the park be maintained at public expense as a forum for the exercise of his constitutional right but also that he may exercise such right with the aid of sound-magnifying equipment so as necessarily to abridge or destroy the equal and correlative rights of others. Granting his constitutional right to freedom of speech, others also have an equal constitutional right not to be compelled to listen and not to be forced to attend a religious meeting and, as members of the public generally, not to have another person destroy their rights to use the park for its dedicated purposes of rest and recreation. We think that the unequivocal statement of the law as it appears in the *Davis* case is sound, reasonably protects the rights of defendant and others, and should be applied here. In our opinion defendant's right is not paramount to the rights of all others and its exercise is not to be indulged without reasonable limitation. Such a right ceases to be

employed in a reasonable manner when in the nature of things its exercise, as here, is bound to abridge or destroy the equal constitutional rights of other members of the public.

At any rate in the circumstances we fail to find wherein the applicable constitutional law of the United States has been stated so clearly that it amounts to a mandate, as urged by defendant, or that would constrain us to reach a result different from that which we expressed in our previous opinion when the case was before us on the certified questions. *State* v. *Fowler, supra.* On the contrary we prefer to apply the recognized rule which prohibits a state court from striking down a legislative enactment unless it appears beyond a reasonable doubt that it violates a particular provision of the constitution of the United States or of this state. So long as the unequivocal statement of law by the Supreme Court of the United States in the *Davis* case is left standing without a reasonably equivalent statement modifying or overruling it, we find it impossible to say beyond a reasonable doubt that the nondiscriminatory and realistically regulatory ordinance in the instant case is unconstitutional for the reasons asserted by the defendant. The defendant's first exception is therefore overruled.

The motion to dismiss, which is the subject of defendant's second exception, has no place in our practice and for that reason could be overruled. However, it admittedly involves the same essential question of law which has been discussed and decided in our previous opinion and also herein under the plaintiff's first exception. Likewise the defendant relies on the identical question under his fourth exception, because there is no dispute as to the evidence that the defendant is guilty if the ordinance is valid. These exceptions are therefore overruled.

For the reasons stated, all of the defendant's exceptions are overruled, the decision and conviction are affirmed, and the case is remitted to the superior court for further proceedings.

BAKER, J., dissenting:

I am unable to agree with the opinion of the majority of the court. This is the same case which was recently before

us on certified constitutional questions of doubt and importance. See *State* v. *Fowler*, R. I. , 83 A. 2d 67. The case is now here after a trial in the superior court.

In my dissent from the opinion filed in the previous case I set out reasons for my view of the section of the ordinance in question. I am still of the opinion that section 11 of chapter 149 of the ordinances of the city of Pawtucket enacted August 17, 1916 is unconstitutional as being contrary to the pertinent provisions of the first and fourteenth amendments to the constitution of the United States. It is unnecessary to restate such reasons as they can be readily ascertained from an examination of the above-mentioned dissent. In the circumstances I am of the opinion that the defendant should be adjudged not guilty and should be discharged.

CAPOTOSTO, J., concurs in the dissenting opinion of Mr. Justice Baker.

APPENDIX B

SUPREME COURT

STATE

v.

WILLIAM B. FOWLER

OPINION

CONDON, *J.*:

This is a criminal complaint which charges the defendant with making a public address to a religious meeting in Slater Park, a public park in the city of Pawtucket, in violation of Section 11 of Chapter 149 of the ordinances of that city. After trial and conviction in the district court the defendant appealed to the superior court and claimed a jury trial.

When the case was called for trial in the superior court and before a jury was impaneled defendant, by leave of court, moved to quash the complaint on the grounds that the ordinance abridged and denied the rights of free assembly,

free speech, and free worship guaranteed by the first and fourteenth amendments to the constitution of the United States and by the constitution of this state. The trial justice declined to rule on the motion because he deemed the constitutional questions thus raised to be of such doubt and importance that they should be certified to this court for our determination pursuant to general laws 1938, Chapter 545, § 6, as amended by public laws 1940, Chap. 941, Sec. 2. Under that statute the superior court is authorized to certify only the questions raised and not the cause itself. *United States Trust Co.* v. *Tax Assessors of City of Newport*, 47 R. I. 420. The trial justice accordingly entered a formal order certifying the following specific questions:

> "Is Section 11 of Chapter 149 of the ordinances of the City of Pawtucket, approved April 17, 1916, on its face and as construed and applied unconstitutional because it abridges the rights of the defendant to Freedom of Speech, Freedom of Association, and Freedom of Worship, contrary to the First and Fourteenth Amendments to the United States Constitution.
>
> "Is Section 11 of Chapter 149 of the ordinances of the City of Pawtucket, approved April 17, 1916, contrary to the provisions of Article I of the Constitution of the State of Rhode Island, with particular reference to Sections 3, 10, and 21."

Since only those questions and not the case are before us we must pass upon the constitutionality of the ordinance without reference to the circumstances out of which the case arose and was originally heard in the district court.

On its face the ordinance, which is hereinafter set out in full in the appendix, prescribes in a series of sixteen sections certain conditions under which any person may lawfully avail himself of the privilege of using the parks belonging to and maintained by the city. One of such conditions is contained in Section 11 which defendant is charged with violating. That section reads as follows:

> "No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or

society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park.".

The prohibition therein is not directed at any particular religious group, but is general and applies without question to all such groups and to all political groups as well.

The ordinance as a whole represents an exercise of the power which the city council has over the management and control of municipal property. Apparently in the exercise of that power the city council decided that the city's parks would more certainly serve the purpose of their establishment as areas of rest and recreation if they were not allowed to become forums for either religious or political controversy. This ordinance is not a legislative act of recent origin nor is it specially directed at the activities of the sect which the defendant represents. Rather it is a municipal regulation of long standing as is evidenced by the date of its approval, April 17, 1916, and hence it antedates by many years the recent prominence of that sect in federal litigation.

We are satisfied that the ordinance was designed not to interfere with freedom of assembly, nor to fetter freedom of speech or prohibit religious worship, but solely to guard the city's parks from being used for activities that reasonably could lead to annoyance and disorder and to that extent defeat the ends for which the city had established the parks as public areas of rest and recreation. The prohibitions contained in the ordinance including Section 11 are quite definitely directed to that end. Out of its experience in conducting the prudential affairs of the city, the city council evidently was convinced that public addresses to religious or political groups in the parks would not be consistent with the purpose for which the parks were being maintained at public expense. Viewed in that light the ordinance appears to be a reasonable police regulation, and as such the people of Pawtucket have long acquiesced in its validity. It is attacked here, for the first time as far as we are aware, thirty-five years after its approval.

The defendant claims that he has a constitutional right to speak in any public park. He concedes that the city may

reasonably regulate that right but that it cannot wholly prohibit its exercise. In other words, he asserts not only the right of free speech but also the privilege of a free forum in which to exercise that right. And he contends that he is supported in such view by the highest judicial authority. He relies on a number of recent cases decided by the Supreme Court of the United States where various kinds of municipal ordinances or administrative practices were held violative of the rights guaranteed by the first amendment to the constitution of the United States and made applicable to the states by the fourteenth amendment. Many of those cases do not involve an ordinance which conditions the lawful use of a municipally owned park upon compliance with certain definite regulations that are not discriminatory. However, some of them do involve such an ordinance or the opinions refer to the right to use such a park. The most important of those cases and the ones upon which defendant appears to rely most strongly are *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147; *Jamison* v. *Texas*, 318 U. S. 413; *Saia* v. *New York*, 334 U. S. 558; and *Niemotko* v. *State of Maryland* and *Kunz* v. *People of the State of New York*, both reported in 19 Law Week 4095 and 4102, and decided by the Supreme Court of the United States January 15, 1951.

The defendant in his brief has quoted in part from and appears to lay particular stress upon the language of Mr. Justice Roberts announcing the decision of the court in *Hague* v. *Committee for Industrial Organization, supra*, at page 515, as follows: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

Apparently the learned justice was only speaking for himself and two of his associates. Moreover, we are at a loss to know what was intended by that declaration especially since it was made in essaying a distinction between the case then before the court and *Davis* v. *Massa-*

chusetts, 167 U. S. 43, which upheld the conviction of Davis for preaching on Boston Common violation of an ordinance like the one in the case at bar. Singularly enough that case was not overruled in the *Hague* case and as far as we are aware has not been overruled, although the court has had occasion to refer to it in several later cases.

In the circumstances *Hague* v. *Committee for Industrial Organization, supra*, can hardly be considered decisive of the case before us. Incidentally in the later case of *Saia* v. *New York*, 334 U. S. 558, which involved the use of a "loud speaker" in a public park, Mr. Justice Jackson dissented and made the following observation concerning the quotation from Mr. Justice Roberts' opinion in the *Hague* case: "The case of *Hague* v. *C. I. O.*, 307 U. S. 496, cannot properly be quoted in this connection, for no opinion therein was adhered to by a majority of the Court. The quotation in the Court's opinion today had the support of only two Justices, with a possible third. The failure of six or seven Justices to subscribe to those views would seem to fatally impair the standing of that quotation as an authority." 334 U. S. 558, 568, Footnote 1. If notwithstanding such criticism, the previously-quoted language of Mr. Justice Roberts in the *Hague* case, *supra*, is to be deemed as binding authority impliedly overruling *Davis* v. *Massachusetts*, *supra*, a great service to state courts would be performed if the Supreme Court itself would make that overruling clear and definite so that courts would have no reason to be misled in the future. We cannot safely rely upon some other court's interpretation of the language and effect of that case. So long as the *Davis* case stands without being specifically overruled by the Supreme Court itself, it is difficult for us to say that an ordinance substantially the same as the one involved in the *Davis* case is nevertheless unconstitutional beyond a reasonable doubt.

The defendant, however, points to *Saia* v. *New York* and *Niemotko* v. *State of Maryland*, *supra*, decided since the *Hague* case, as clear instances where the Supreme Court has definitely included public parks, as well as highways, within the orbit of its decisions protecting the freedoms of the first amendment from local abridgment or denial. In each

of those cases it is true that the locus of the forbidden act was a public park but there the similarity to the case at bar ends. In the *Niemotko* case there was no ordinance of general application involved but rather an act of arbitrary discrimination by an administrative official. Indeed at the very outset of its opinion in that case the court observed that there was no ordinance regulating the use of the park in question.

As far as the *Saia* case is concerned the ordinance there prohibited the use of a "loud speaker" device which casts its sound directly upon streets and public places. A public park was only incidentally involved because the defendant set up his "loud speaker" in such a place. He was arrested for using a "loud speaker" in defiance of the ordinance, not for making a public address in the park. The ordinance in question apparently was not invoked by the city to prohibit public addresses to a religious meeting in the park. The court in a five-to-four decision held that the city could not ban the use of a loud speaker in the manner provided in that ordinance because such use was comprehended within the constitutional guarantee of freedom of speech under the first amendment. It was upon that question that the court split. We do not think that point of decision is relevant to the particular controversy in the case at bar. Moreover the authority of the *Saia* case would seem to be questionable in view of the decision in *Kovacs* v. *Cooper*, 336 U. S. 77.

In the *Kovacs* case the court upheld an ordinance which probibited the use of "loud speakers" on the streets and public places of Trenton, New Jersey. Mr. Justice Frankfurter and Mr. Justice Jackson who had dissented in the *Saia* case concurred in the decision and commented adversely on the *Saia* decision. The former said it would be "to start with an unreality" to rest the *Kovacs* decision on that case, and the latter expressly said that *Kovacs* repudiated *Saia*. Three justices who had concurred in the *Saia* decision dissented in the *Kovacs* case and also stated

that the decision repudiated the holding in the *Saia* case. Later in *Niemotko* v. *State of Maryland, supra*, Mr. Justice Frankfurter concurring in a separate opinion said: "In *Kovacs* v. *Cooper*, 336 U. S. 77, part of the Court construed the ordinance as allowing conviction for operation of any sound truck emitting 'loud and raucous' noises, and part construed the ordinance to ban all sound trucks. The limits of the decison of the Court upholding the ordinance are therefore not clear, but the result in any event does not leave the *Saia* decision intact." And perhaps *Breard* v. *City of Alexandria*, 19 Law Week 4375, is a further indication of a more restrained approach to the solution of conflicts over local limitations on those freedoms. One of the dissenting justices therein goes so far as to say that such decision overrules certain prior cases in which the court declared invalid certain municipal ordinances as violative of liberty of speech, press and religion. In any event explicit clarification would seem to be necessary if the trial courts are to be given a clear guide for deciding in those cases that legislative enactments are beyond reasonable doubt in conflict with the constitution of the United States.

We are of the opinion that the other cases cited by the defendant afford no stronger support to his contention than those above mentioned and, therefore, we need not discuss them here. Moreover we are convinced that the case at bar is clearly ruled by *Davis* v. *Massachusetts*, 167 U. S. 43. The justice of the district court expressly relied upon that case in finding the defendant guilty. Perhaps a brief discussion of its background should be made here because it is obviously a decision that the Supreme Court of the United States has been reluctant to disturb in spite of language in a number of more recent opinions which might seem to be inconsistent therewith. In our opinion

it is a case more nearly on all fours with the one at bar than any of the cases relied upon by the defendant.

Davis contended that he had a constitutional right guaranteed by the fourteenth amendment to the constitution of the United States to preach the gospel on Boston Common notwithstanding an ordinance which expressly forbade the making of a public address upon any public grounds except by permission of the mayor. The supreme judicial court of Massachusetts in upholding his conviction unanimously held that the ordinance was constitutional. *Commonwealth* v. *Davis,* 162 Mass. 510. That court held that the constitutionality of the ordinance was not open to doubt and that it was a fallacy to assume that it was "directed against free speech generally * * * whereas in fact it is directed toward the modes in which Boston Common may be used." It is interesting to note that this opinion was rendered by Mr. Justice Holmes.

In a concurring opinion in *Kovacs* v. *Cooper,* 336 U. S. 77, 95, Mr. Justice Frankfurter said: "The ideas now governing the constitutional protection of freedom of speech derive essentially from the opinions of Mr. Justice Holmes. * * * Accordingly, Mr. Justice Holmes was far more ready to find legislative invasion where free inquiry was involved than in the debatable area of economics." Few will deny the accuracy of this estimate of Mr. Justice Holmes' judicial disposition and his basic influence in promoting this branch of the law to its present state of development. Apparently, however, he was far from ready, despite his solicitude for these precious freedoms, to deprive a municipality of its power to control the use of its own property.

After Mr. Justice Holmes had been elevated to and served on the federal Supreme Court for eight years he apparently continued to be of the opinion that state laws should not be hurriedly overthrown as violative of the bill

of rights or the fourteenth amendment. Speaking for a unanimous court in *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110, he said that "we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the States is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power."

When *Commonwealth* v. *Davis*, *supra*, was appealed by Davis to the Supreme Court of the United States he contended that the local law under which he was convicted was contrary to the fourteenth amendment to the constitution of the United States. There Mr. Justice White, speaking for a unanimous court, rejected such contention saying: "The Fourteenth Amendment to the Constitution of the United States does not destroy the power of the States to enact police regulations as to the subjects within their control * * * and does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the constitution and laws of the State." And he concluded with the following words, so apposite in our opinion to the case at bar: "The plaintiff in error cannot avail himself of the right granted by the State and yet obtain exemption from the lawful regulations to which this right on his part was subjected by law." Unless the *Davis* case is no longer the law the ordinance in question here is valid and binding upon the defendant.

Before concluding our consideration of this contention perhaps some reference should be made to defendant's argument that a religious address may be permitted in a public park without contravening the concept of separation of church and state as expounded in the recent case of *McCollum* v. *Board of Education, Etc.*, 333 U. S. 203. Defendant has pressed this point at considerable length in his brief and in his oral argument. This appears to be an act of supererogation, as the state is not claiming that the ordinance is valid on the strength of the *McCollum* case, but frankly concedes that the parks may be used for certain religious purposes. We quote the following from page 19 of its brief: "There is nothing in this ordinance, which would prohibit religious services of any kind from being held in the public parks of the City. There is nothing in this ordinance which prohibits or restricts any individual from offering prayer or singing hymns or conducting a religious ritual in the public parks. It is only an address on such an occasion that is prohibited by this ordinance." We are therefore not called upon to decide whether the constitutional doctrine of the *McCollum* case which denies the use of a public school for a period of religious instruction nevertheless permits the use of public parks for religious services.

Defendant has also contended that section 11 violates the rights guaranteed by sections 3, 10 and 21 of article I of the constitution of this state. Although defendant did not point out those sections specifically in his motion to quash, as he should have done, the trial justice in his order of certification assumes that they are the sections relied upon. We have no hesitancy in saying that insofar as those sections secure the freedoms of assembly, of religion, and of speech, section 11 of the ordinance here in question does not in any true sense violate them.

This court has not given to those guarantees the wide sweep which the federal Supreme Court in the last decade or two has given to similar guarantees in the first amendment to the federal constitution. Of course we are in complete accord that such rights must be vigilantly guarded not only from direct but also from indirect attacks. Insidious no less than open assaults upon them must be sternly resisted if they are not to be lost by erosion. But we are also aware that true liberty of any kind cannot exist without public order. Preservation of the balance between liberty on the one hand and authority and order on the other has ever been a difficult task for the courts and no less difficult for those immediately charged with the duty of maintaining public order. It should be our constant concern while safeguarding the first not to go so far as to make unduly difficult or perhaps impossible the discharge of the other.

In such frame of reference we have considered the questions propounded here. As far as our state constitution is concerned we see nothing contrary thereto in this ordinance. As to the federal constitution we follow the law as declared by the United States Supreme Court. It has unequivocally declared in *Davis* v. *Massachusetts, supra*, that an ordinance like the one in the case at bar does not violate that constitution. In no later decision do we find that the Supreme Court has definitely overruled that case and decided to the contrary. We, therefore, hold on the authority of that case that the ordinance in question does not violate the federal constitution.

Accordingly we answer in the negative each question set out in the order of certification, and the papers in the case are ordered sent back to the superior court for further proceedings.

BAKER, J., dissenting. I am unable to agree with the majority opinion because in my judgment section 11 of chapter 149 of the ordinances of the city of Pawtucket enacted August 17, 1916 is clearly prohibitory and not in any sense merely regulatory in respect to the right of free speech in a public park in that city. The section does not even contain, for what it may be worth, a provision that a license may be issued by a municipal authority permitting the making of an address in any manner, at any time, or in any place. It may be that other sections of the chapter are regulatory in nature, but they in no way refer to or have any connection with section 11, which is the only portion of the chapter material to the questions before us. Since section 11 is plainly distinct and separable from the rest of the chapter the validity of that section should rest upon its own language without reference to other clearly unrelated provisions of said chapter.

Also in my opinion *Davis* v. *Massachusetts*, 167 U. S. 43, upon which the majority of the court relies, cannot properly be held to govern the instant case. While it is true that the above-cited case has never been specifically overruled by the Supreme Court of the United States, nevertheless in my judgment that court, in later decisions where it referred to the *Davis* case, has so weakened its effect as an authority that I am unable to accept it as controlling here. Among such decisions are *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, *Jamison* v. *Texas*, 318 U. S. 413, *Saia* v. *New York*, 334 U. S. 558, and *Niemotko* v. *State of Maryland*, 19 Law Week 4095. See also *Milwaukee County* v. *Carter*, 258 Wis. 139, a recent opinion of a state court of last resort. Several of these cases involve the right of free speech in public parks. The general principles of law applicable to the amendments of the constitution of the United States, as set out in such cases and in others, are in substance inconsistent with and contrary to the holding in the *Davis* case.

In addition it may be noted that in *Commonwealth* v.

Gilfedder, 321 Mass. 335 (1947), the supreme court of that state, in a case involving the right to make an address on Boston Common contrary to an ordinance of that city and certain rules of the board of park commissioners, held such ordinance and rules to be in conflict with the rights of freedom of speech, of the press, and of assembly guaranteed by the first amendment to the constitution of the United States. At page 342 of that opinion the court makes the following comment: "We confess to difficulty in reconciling the present decision with the decisions in the *Davis* cases. Nevertheless, we feel compelled to the result now reached by the broad sweep of principles set forth in great amplitude in more recent decisions of the Supreme Court of the United States."

For the reasons stated it is my opinion that section 11 of chapter 149 of the ordinances of the city of Pawtucket is contrary to the pertinent provisions of the first and fourteenth amendments to the United States constitution. I therefore answer in the affirmative the first question certified to us by the trial justice.

In view of the fact that I have construed section 11 of the ordinance to be invalid under the federal constitution, and further as the defendant in his motion to quash did not specifically point out the particular sections of the constitution of this state which he alleges are violated by section 11, as our well-established practice requires, I am of the opinion that it is unnecessary for me to answer the second question certified by the trial justice.

CAPOTOSTO, J. concurs in the dissenting opinion of Mr. Justice Baker.

Appendix

"Chapter 149.

Approved August 17, 1916.

An Ordinance Providing Rules and Regulations for Public Parks in the City of Pawtucket.

It is ordained by the City Council of the City of Pawtucket as follows:

Section 1. No person is allowed to land or take passengers on any boat from the banks of the pond. Any person entering or leaving a boat must do so at the landing provided therefor.

Sec. 2. No person is allowed to occupy the tennis court for more than one hour if other patrons of the Park are waiting to play. While playing on the tennis court patrons must wear shoes without heels or spikes.

Sec. 3. No person is allowed to use profane language in the Park and Ladies and Children must not be annoyed or molested by anyone.

Sec. 4. Slater Park shall be open to the public from sunrise until eleven o'clock afternoon from April first to November first, and from sunrise until ten o'clock afternoon from November first to April first in each and every year; and no person shall enter or be within the limits of said park except between said hours without permission from the Commissioners or Superintendent of Parks.

Sec. 5. No person shall take, pluck, injure, destroy, cut, mark or deface any flower, root, plant, shrub, tree, building, fence, monument or other property in any park. No person shall throw a stone or other missile in any park.

Sec. 6. No person shall ride or drive within any park at a rate of speed exceeding ten miles per hour. No person shall ride or drive any animal, bicycle or other vehicle except upon the driveways; nor ride or drive any animal, bicycle or vehicle upon other than the right hand side of the driveways, except to cross such driveway or to turn out for some obstruction, or for some animal, bicycle or other vehicle going in the same direction.

Sec. 7. Automobiles, or other vehicles, must not be driven faster than ten miles per hour within the limits of the Park.

Sec. 8. No person shall drive any heavy team, nor any swill or residuum cart, nor any team or carriage for the purpose of business, into any park, without permission from the Commissioners or Superintendent of Parks.

Sec. 9. All vehicles while within the limits of the Park must conform strictly to law regarding lights to be carried.

Sec. 10. No person shall bathe or fish in, nor go into, nor send any animal into, any of the waters of any park, nor disturb any of the fish, birds, water fowl or animals in any park, nor throw or place any article or thing in said waters; provided however, that fishing in any such waters from boats owned by the City of Pawtucket may be allowed by the park commissioners at such times and under such regulations and upon payment of such fees as said commissioners may from time to time prescribe and determine.

Sec. 11. No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park.

Sec. 12. No person, being the owner or having the charge or custody of any dog, cat, fowl, goat, swine or neat cattle, shall allow such dog, cat, fowl, goat, swine or neat cattle to enter any public park or to remain therein.

Sec. 13. No person, except in the employ of the commissioners or superintendent of parks, shall light, build or make any fire in any park, square or public grounds.

Sec. 14. No automobile, or other vehicle, shall be permitted to remain stationary in any part of said park for a longer period than ten minutes, except in such locations as shall be assigned for such purpose by the park commission; and any person in charge of such automobile or other vehicle shall at any time, upon the direction of any officer, immediately remove such automobile or other vehicle to such location as such officer shall direct.

Sec. 15. Any person violating any of the provisions of this ordinance shall be fined not exceeding twenty dollars,

or be imprisoned for a term not exceeding ten days for each offense.

Sec. 16. This ordinance shall take effect upon its passage."

APPENDIX C

SUPREME COURT OF RHODE ISLAND

No. 9264

STATE

v.

WILLIAM B. FOWLER

On Appeal to the Supreme Court of the United States

STIPULATION THAT A SUBSTANTIAL FEDERAL QUESTION IS INVOLVED

It Is Hereby Stipulated and Agreed that this stipulation can be filed with the papers on appeal to the Supreme Court of the United States and printed as an appendix to the statement as to jurisdiction.

It Is Further Stipulated that appellee agrees that this appeal presents to this Court a substantial federal question that ought to be determined by the Supreme Court of the United States. The appellee does not, however, agree that the ordinance is invalid, either on its face or as construed and applied, it being understood that it will contend before the Supreme Court of the United States that the ordinance is, in all things, constitutional upon its face and as enforced against the appellant.

Dated August 22, 1952.

RAYMOND J. GUTHRIE,
Attorney for Appellee,
Assistant Attorney General;
[illegible]
JOHN McGUIRE,
HAYDEN C. COVINGTON,
Attorneys for Appellant.

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 340

WILLIAM B. FOWLER, APPELLANT,

vs.

STATE OF RHODE ISLAND

APPEAL FROM THE SUPREME COURT OF THE STATE OF RHODE ISLAND

BRIEF FOR APPELLANT

HAYDEN C. COVINGTON

Counsel for Appellant

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 340

WILLIAM B. FOWLER, APPELLANT,

vs,

STATE OF RHODE ISLAND

APPEAL FROM THE SUPREME COURT OF THE STATE OF RHODE ISLAND

BRIEF FOR APPELLANT

Opinions Below

Two opinions were written by the court below in this case. The first opinion answered certified questions, holding that the ordinance in question was valid. 83 A. 2d 67. This opinion appears in the record. [43-56][1] The second opinion gave the reasons for the affirmance of the conviction entered following the return of the answers to the certified questions. This opinion is reported at 91 A. 2d 27. It also appears in the record. [1-10]

[1] Figures appearing in brackets herein refer to pages of the printed transcript of record.

Jurisdiction

The judgment of the Supreme Court of Rhode Island affirming the judgment of the Superior Court was entered August 12, 1952. [9] The judgement became final on August 12, 1952. [9] The petition for appeal to this Court was allowed within 90 days after the judgment became final. [56] The appeal to this Court was timely allowed. [58] Probable jurisdiction was noted by this Court on November 10, 1952. [62]

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error. This case presents a state of facts within the jurisdiction of this Court.

Question Presented

Does the prohibition in the ordinance of holding a meeting for, and speaking in the park upon a religious or political subject, both on its face and as construed and applied, constitute a violation of the federal Constitution because it amounts to a prohibition of the exercise or an illegal burden and abridgment of the appellant's rights of freedom of speech, assembly and worship guaranteed by the First and Fourteenth Amendments to the Constitution of the United States?

The question was raised by motions to quash and to dismiss filed in the Superior Court of Rhode Island. [10, 12, 21, 40] This question was adversely determined by the Superior Court and by the Supreme Court of Rhode Island. [12, 21, 41]

Statute Involved

This case draws into question the validity of an ordinance of the City of Pawtucket, duly enacted on August 17, 1916, Chapter 149, which provides as follows:

> No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park.

The entire ordinance was received in evidence as an exhibit. [14] It is printed in the record. [54-56]

Constitutional Provisions Involved

The First Amendment, relied upon in this case, reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The pertinent parts of the Fourteenth Amendment which appellant relies upon read as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any per-

son within its jurisdiction the equal protection of the laws.

Statement

Nature and History of Action

This is a criminal case. It is an appeal from a judgment of the Supreme Court of Rhode Island affirming a judgment of conviction on trial *de novo* in the Superior Court of Rhode Island on appeal from the District Court of Pawtucket. [13] The appellant was charged by complaint with violating the ordinance in question on September 3, 1950. The complaint and warrant, among other things, charged as follows:

> On the 3rd day of September A.D. 1950, with force and arms, William B. Fowler alias John Doe laborer, of said Pawtucket, did violate Section 11 of Chapter 149 of the ordinances of the City of Pawtucket in that he did address a religious meeting in a public park, to wit; Slater Park against an Ordinance of the City of Pawtucket and against the Statute and the peace and dignity of the State. [13]

Appellant pleaded not guilty in the District Court. He was found guilty and fined. [13] He appealed to the Superior Court. [13] On the first hearing before the Superior Court of Rhode Island the case was reserved and questions certified to the Supreme Court of Rhode Island. [1, 43-57] The Supreme Court of Rhode Island answered the questions that the ordinance was constitutional. 83 A. 2d 67.

The case was tried in the Superior Court following the opinion of the Supreme Court of Rhode Island. The appel-

lant pleaded not guilty. [12] A jury trial was waived and the case was tried to the judge alone. [12-13] At the close of the evidence a motion for judgment of acquittal was made. [21, 40] On October 22, 1951, the court overruled it and rendered a judgment convicting appellant. [41] He was fined $5.00. [41]

The constitutional question was raised by a motion to quash and by a motion to acquit filed in the Superior Court of Rhode Island. [12, 21, 40-41] The question presented in that court was considered and overruled. [12, 21, 41] Each holding of the trial court was presented on appeal to the Supreme Court of Rhode of Island and duly assigned as error. [1, 2, 3, 9] Each federal question presented upon this appeal was overruled by the Supreme Court of Rhode Island. [9] A judgment of affirmance was entered. [9]

Facts

Slater Park is a public park within Pawtucket, Rhode Island. [14] Fowler was arrested because he addressed a religious gathering of four hundred people in that park on September 3, 1950. [15]

Slater Park is 194 acres in size. It has tennis courts, a children's playground, a bandstand, a lake with boats on it, a baseball field, 16 fireplaces to accommodate picnickers, animal and bird compounds, extensive floral gardens and large natural woodlands. It is intersected by improved roads. Also, there is ample space in the park for public assemblies. Public meetings can be held without interfering with other activities in the park. [14]

It is the policy of Jehovah's witnesses to give Bible talks to religious assemblies in public parks throughout the United States during the summertime. [36]

Jehovah's witnesses applied for and received permission to use the park for the holding of a religious assembly and

the giving of a Bible talk. [21-22] Their application for permission was granted for August 20 and 27, 1950. [23-24]

Fowler is an ordained minister of Jehovah's witnesses and a direct representative of the Watchtower Bible and Tract Society, the legal governing body of the group. [26] He is associated with the Cambridge, Massachusetts, congregation of Jehovah's witnesses. [27] Before September 3, 1950, he had been invited to give two talks in Slater Park in Pawtucket. One was on August 27 and the last was on September 3, 1950. [27] While no trouble was experienced on August 20, appellant was stopped while attempting to give a Bible discourse to a religious assembly on August 27, one of the dates covered by the permit. [24, 32][2]

Notwithstanding the fact that he was prevented from completing his talking to an assembly in Slater Park on August 27, Fowler agreed to address another religious assembly with a Bible talk on September 3, 1950 in the park. [27]

Fowler arrived at the park at 3:45 in the afternoon. [27] The place where the assembly was to be held was about one-half mile inside the park. [29] The spot for the assembly was shaded with trees. Four hundred persons were gathered. Some were seated but the greater number of the group were standing on the grass in the park. [15, 17, 28, 31] The place of assembly was suitable. [28] There were no other meetings anywhere around. The place of assembly was quiet and the assembly of four hundred persons did not interfere with the use of the park by any other persons. [29] There was no disturbance or annoyance, no use of foul language and no person was attacked. There were no threats of breach of the peace. [18]

About five minutes to 4:00 o'clock on Sunday afternoon,

[2] The trial court properly held that evidence of permits, previous assemblies and prior difficulty was immaterial. [23, 25-26]

September 3, 1950, Fowler began speaking to the assembly of four hundred persons. [28] The subject that he spoke on was "The Pathway to Peace". [30] The chief of police arrived shortly after the assembly was gathered and the Bible talk was in progress. [16-17, 31] The chief of police found Fowler addressing the audience through a microphone connected with two loud-speakers. [16] The assembly had previously been brought to order by a chairman. [31] Fowler had introduced his speech, "The Pathway to Peace," by referring to President Truman's talk on peace. He showed from Scriptural proof that the world, and this country in particular, was in the same status that Babylon was in "before its destruction some two thousand years ago". The chief of police testified to this. [16, 31] The chief heard Fowler say that it was futile for the nations to attempt to make peace because they were pursuing the wrong method to obtain it instead of the way prescribed by Jehovah. [16] Fowler added that the people had reached the time of "the end of this wicked system of things". [31]

At the end of the first five minutes of Fowler's talk the chief of police approached him while he was speaking to the assembly at the rostrum. [16-17] The chief of police asked Fowler if he had authority to speak in the park. Fowler told the chief that he did not need permission. [17, 32] Fowler had previously told the chief that the authorities at Pawtucket did not have the right to stop Jehovah's witnesses from using the park, when he was stopped by the chief of police before. [32] The chief of police informed Fowler he was placing him under arrest for a violation of the ordinance in question. Fowler informed the chief of police that he was an ordained minister of Jehovah's witnesses. [18] Fowler told the chief further that he had been speaking for Jehovah's witnesses for over thirty-eight years and that he had been assigned as the speaker "of the day". [17] The chief of police took Fowler into cus-

tody and brought him to the police station in Pawtucket. [17]

Fowler informed the chief and another police officer at the station that they had violated his rights guaranteed by the United States Constitution and that Jehovah's witnesses did not come to the park for an evil purpose but that they assembled in the park and he had given the talk "for the purpose of doing good and, certainly, the people of Pawtucket need some good instructed into them as well as other cities and towns in the country". He pointed out that the sole purpose of the talk at the assembly was to exalt the name of Jehovah God and tell the people that "His kingdom was at hand" and that it was "the only possible solution to the world's trouble". [32-33]

The chief of police admitted that the only reason for the arrest was not because of any misconduct or disturbance but solely because Fowler failed to "have legal authority to be in the park to make this speech and hold the assembly". [18-19] The chief of police realized that it was impossible for Fowler to have a permit because the ordinance forbade religious talks and assemblies in the park. [19] He added that Fowler was courteous and polite in all of his dealings with him. [19]

Fowler informed the officials that they should have stayed in the park and seen that order was observed and that he was given an opportunity to tell the people of Pawtucket "God's message", rather than arrest him. [33]

Fowler was fingerprinted, photographed and listed in "the Rogue's Gallery" of Pawtucket because he preached in the park, contrary to the ordinance. [34]

Summary of Argument

Ordinances absolutely prohibiting distribution of literature on streets have been held unconstitutional. *Jamison* v. *Texas*, 318 U.S. 413. The same principle applies to ordinances prohibiting assemblies and talks in public parks without permits. *Hague* v. *C.I.O.*, 307 U.S. 496; *Commonwealth* v. *Gilfedder*, 321 Mass. 335, 73 N.E. 2d 241. By force of the same reason the ordinance here is unconstitutional because it contains an outright prohibition of the use of the parks for religious and political assemblies.

Davis v. *Massachusetts*, 167 U.S. 43, is not in point because it involved no outright prohibition of the use of the parks as is done by this ordinance. The ordinance in that case provided for a permit for park meetings. The court below unlawfully simulated this case to the *Davis* case. If the two cases are alike and the *Davis* case is drawn in question by the facts here, then it is contended that *Davis* v. *Massachusetts*, *supra*, is inapplicable because it has been narrowed or cut down by *Hague* v. *C.I.O.*, 307 U.S. 496, and *Jamison* v. *Texas*, 318 U.S. 413. See *State* v. *Derrickson*, 97 N.H. 91, 81 A. 2d 312; *Commonwealth* v. *Gilfedder*, 321 Mass. 335, 73 N.E. 2d 241. If it is a fact that *Davis* v. *Massachusetts*, *supra*, has not been overruled and should that case be found in point, then the Court is requested to overrule the decision in the *Davis* case or clarify the present status of the decision in view of later decisions by the Court.

The Pawtucket ordinance cannot be saved because it confines itself to religious and political assemblies. The doctrine of separation of church and state does not prevent a religious speaker from claiming the benefits of freedom of assembly. As long as there is no appropriation of the use of the public park property to the exclusive use of Jehovah's witnesses and since the use of the park by appellant is the same as the use that any other speaker makes of the park, it cannot be said that the separation decisions of this Court

prevent the speech and assembly in the park in this ca
Compare *McCollum* v. *Board of Education,* 333 U.S. 2
with *Zorach* v. *Clauson,* 343 U.S. 306. See *Niemotko* v. *Ma*
land, 340 U.S. 268, at pages 272-273, where the Court
clined to decide this point.

There is no discrimination against religion's claim
its use of freedom of speech and assembly guaranteed
the Constitution. Since there is no express limitation
withdrawal of the protection granted by the Constitut
under the freedom of assembly guarantee, then none
be impliedly drawn or read into the First Amendment
a court decision.

Appellant, in speaking in the park, was entitled to
same right under the Constitution as would have beer
speaker on a social, educational or scientific subject addre
ing a secular audience in the park. He is entitled to ass
that the ordinance is unconstitutional on its face and
construed and applied to his use of the park, for the reas
fully set forth in the argument below.

Argument

The prohibition in the ordinance of holding a meeting and speaking in the park upon a religious or political subject, both on its face and as construed and applied, constitutes a violation of the federal Constitution because it amounts to a prohibition of the exercise or an illegal burden and abridgment of the appellant's rights of freedom of speech, assembly and worship guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

The decision of the court below flies in the teeth of the decision in *Jamison* v. *Texas*, 318 U.S. 413: There the Court held invalid an ordinance that prohibited the distribution of literature. In this case the ordinance prohibits holding a meeting and giving a speech on lawful and constitutional subjects in the park. There is no difference between the rights of freedom of press, speech, assembly and worship guaranteed by the First and Fourteenth Amendments against state abridgment. The distinction of the *Jamison* decision because freedom of the press was involved there and not freedom of speech, assembly and worship, as here, is a futile effort by the court below. The court missed the mark. It has failed to make a distinction. The attempted distinction is a distinction without a difference which must be corrected by the Court.

The Court in the *Jamison* case, *supra*, held that an ordinance which prohibited the exercise of constitutional rights on the streets was void. The ordinance in this case prohibits the exercise of such liberties in the park. There is no distinction between prohibition of the exercise of rights on the streets and in the parks. The fact that literature rather than speech was involved in the *Jamison* case is immaterial.

The right of free speech is as strong as the right of fr
press. Neither can be prohibited as is done by the ordinan
in this case.

In *Commonwealth* v. *Gilfedder*, 321 Mass. 335, 73 N.
2d 241, the Supreme Judicial Court said that, "Some
these decisions relate to the distribution of printed matt
in streets and ways, but it seems plain that in respect
general principles no distinction can be drawn between th
right to distribute printed matter and the right of publ
speech or between the exercise of those rights in publ
streets and their exercise in public parks."

The court below relied heavily on *Davis* v. *Massach*
setts, 167 U.S. 43. This Court's attention is called to th
decision in the *Gilfedder* case, *supra*, where the Suprem
Judicial Court of Massachusetts, among other things, said

"A series of recent decisions by the Supreme Court o
the United States has, as we read the cases, established th
proposition that the exercise of these rights cannot b
wholly precluded in public places such as streets and park
by sweeping general prohibitions and cannot be subjected t
the requirement of permits the granting of which is no
governed by binding rules adequate to insure the exercis
of the rights under reasonable conditions. Perhaps the mos
completely in point of these decisions are *Hague* v. *Com*
mittee for Industrial Organization, 307 U.S. 496, *Schneide*
v. *State*, 308 U.S. 147 (reversing *Commonwealth* v. *Nichols*
301 Mass. 584), *Jamison* v. *Texas*, 318 U.S. 413, and *Tucke*
v. *Texas*, 326 U.S. 517. Pertinent also in some aspects ar
Lovell v. *Griffin*, 303 U.S. 444, *Thornhill* v. *Alabama*, 310 U.S
88, *Carlson* v. *California*, 310 U.S. 106, *Cantwell* v. *Connecti*
cut, 310 U.S. 296, *Largent* v. *Texas*, 318 U.S. 418, *Murdoch*
v. *Pennsylvania*, 319 U.S. 105, *Martin* v. *Struthers*, 319 U.S
141, and *Thomas* v. *Collins*, 323 U.S. 516." (321 Mass. 335,
73 N.E. 2d 241.)

In commenting on the decision by the Supreme Court in
Davis v. *Massachusetts*, the court continued:

"The Commonwealth presses upon us the cases of *Commonwealth* v. *Davis*, 162 Mass. 510 (affirmed sub nomine *Davis* v. *Massachusetts*, 167 U.S. 43), and asks us to follow these decisions, while the defendants ask us to overrule them. These cases also turned upon the validity of ordinances forbidding public addresses upon Boston Common without a permit. We confess to difficulty in reconciling the present decision with the decisions in the *Davis* cases. Nevertheless, we feel compelled to the result now reached by the broad sweep of principles set forth in great amplitude in more recent decisions of the Supreme Court of the United States. That court in *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496, at page 515, while seemingly doubting *Davis* v. *Massachusetts*, 167 U.S. 43, nevertheless distinguishes that case on the ground, as we understand the opinion, that the ordinance in the *Davis* case was not directed solely at the exercise of the rights of speech and assembly, but was addressed as well to other activities that could constitutionally be prohibited."

Mr. Justice Frankfurter, commenting on *Davis* v. *Massachusetts*, 167 U.S. 43, in his concurring opinion in *Niemotko* v. *Maryland*, 340 U.S. at page 279, said, among other things:

"An attempt to derive from *dicta* in the *Davis* case the right of a city to exercise any power over its parks, however arbitrary or discriminatory, was rejected in *Hague* v. *C.I.O.*, supra."

Davis v. *Massachusetts*, 167 U.S. 43, involved a law which required a permit before a speech could be made in the Boston Common. The same decision was relied upon by the state in *Jamison* v. *Texas*, 318 U.S. 413. The unanimous Court said: "It relies primarily on *Commonwealth* v. *Davis*, 167 U.S. 43. This same argument made in reliance upon the same decision has been directly rejected by this Court. . . . Here, the ordinance as construed and applied prohibits the dissemination of information by handbills. As such, it cannot be sustained."

There are other reasons why *Davis* v. *Massachusetts*, 167 U.S. 43, should not be relied upon. They were urged to the court below by the appellant when the certified questions were argued. The contention was succinctly stated by Mr. Justice Baker in his opinion, which was concurred in by Mr. Justice Capotosto. See *State* v. *Fowler*, 83 A. 2d 67. [52-54] Among other things he said: "Also in my opinion *Davis* v. *Massachusetts*, 167 U.S. 43, upon which the majority of the court relies, cannot properly be held to govern the instance case. While it is true that the above-cited case has never been specifically overruled by the Supreme Court of the United States; nevertheless in my judgment that court, in later decisions where it refered to the *Davis* case, has so weakened its effect as an authority that I am unable to accept it as controlling here. Among such decisions are *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496, *Jamison* v. *Texas*, 318 U.S. 413, *Saia* v. *New York*, 334 U.S. 558, and *Niemotko* v. *State of Maryland*, 19 Law Week 4095. [340 U.S. 268] See also *Milwaukee County* v. *Carter*, 258 Wis. 139, a recent opinion of a state court of last resort. Several of these cases involve the right of free speech in public parks. The general principles of law applicable to the right of freedom of speech and assembly under the First and Fourteenth Amendments of the constitution of the United States, as set out in such cases and in others, are in substance inconsistent with and contrary to the holding in the *Davis* case.

"In addition it may be noted that in *Commonwealth* v. *Gilfedder*, 321 Mass. 335 (1947), the supreme court of that state, in a case involving the right to make an address on Boston Common contrary to an ordinance of that city and certain rules of the board of park commissioners, held such ordinance and rules to be in conflict with the rights of freedom of speech, of the press, and of assembly guaranteed by the First Amendment to the constitution of the United States. At page 342 of that opinion the court makes the

following comment: 'We confess to difficulty in reconciling the present decision with the decisions in the *Davis* cases. Nevertheless, we feel compelled to the result now reached by the broad sweep of principles set forth in great amplitude in more recent decisions of the Supreme Court of the United States.'" [52-53]

The Supreme Court of New Hampshire in *State* v. *Derrickson*, 97 N.H. 91, 81 A. 2d 312, said: "At this juncture it is important to state that in sustaining the Portsmouth ordinance no reliance is placed on *Davis* v. *Massachusetts*, 167 U.S. 43, which is believed to have been so eroded by the force of time and recent decisions as to be valueless as a binding precedent."

The *Davis* case falls for other reasons. It is among that group of old civil liberties cases where it was held that such liberties were not within the reach of the Fourteenth Amendment against the states, although guaranteed by the First Amendment. The *Davis* case is due for an overruling because this doctrine that the First Amendment is no restraint against the states through the Fourteenth Amendment has been overruled. This Court, in harmony with present-day law, therefore, put at rest one of the old erroneous decisions, *Mutual Film Corp.* v. *Industrial Comm. of Ohio*, 236 U.S. 230, based on the old false principle, in *Burstyn, Inc.* v. *Wilson*, 341 U.S. 329. The *Davis* case was erroneously decided and should be set aside. It should be now overruled because it was decided on the false doctrine that the Fourteenth Amendment did not carry forward the guarantees of the First Amendment. This reason is in addition to the fact that it conflicts with later decisions of this Court above cited.

Public parks have from time immemorial been used as places of public assembly and delivery of speeches of all kinds upon innumerable occasions (*Hague* v. *C.I.O.*, 307 U.S. 496 at page 515; *Schneider* v. *New Jersey*, 308 U.S. 147; *Jamison* v. *Texas*, 318 U.S. 413; *Saia* v. *New York*, 334 U.S.

558; *Niemotko* v. *Maryland*, 340 U.S. 268) and, contrary to the holding of the court below, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *New Jersey*, 308 U.S. 147, 163.

Appellant in this case stands squarely on all the holdings of this Court declaring that ordinances forbidding the holding of public assemblies in parks and the use of public streets for the purpose of preaching the Gospel are void and unconstitutional. The holding here should be the same as the holding in those cases.

While the court below did not say that the city had the right to keep religious groups out of the parks of Pawtucket under the doctrine of separation of church and state, such doctrine may be considered by this Court in this case. The point was presented in *Niemotko* v. *Maryland*, 340 U.S. 268, but not decided. See 340 U.S. at pages 272-273. It is believed that the question now is clearly presented by the ordinance in this case and must be determined here and now. It is submitted that the case here is controlled by *Zorach* v. *Clauson*, 343 U.S. 306, and that *McCollum* v. *Board of Education*, 333 U.S. 203 does not apply. See also *Everson* v. *Board of Education*, 330 U.S. 1.

The position here taken on the lack of constitutional authority in the City of Pawtucket to exclude religious meetings and to prohibit religious talks in the parks of the city is directly supported by *County of Milwaukee* v. *Carter*, 258 Wis. 139, 45 N.W. 2d 90. In that case the ordinance was identical to the one involved here. In that case the facts were the same as those in this case. It involved the holding of a meeting by Jehovah's witnesses in Lake Shore Park in Milwaukee. The court said:

"When, in Article I, Section 3, the Wisconsin Constitution guarantees the right of free speech it does not except or restrict speech on the subject of religion and, if it should, such restriction would be void because in conflict

with and subordinate to the First and Fourteenth Amendments of the United States Constitution, which neither make nor recognize any such limitation. Speech on religious topics is just as free, and no freer, under the constitution as speech on other subjects and on no subject is it free from reasonable regulation to insure public order and safety and to reconcile the exercise of this right with the simultaneous enjoyment of equally sacred rights by others. The Milwaukee County ordinance purports not to regulate but to prohibit speech in public parks on political as well as religious subjects. Section 47.02 (7) provides: 'No sermon, discussion, harangue or speech shall be delivered by any person for political purposes or in connection with the sale of any article or which shall constitute a public criticism or abuse of any religious organization or representative thereof.' Government may, in the interests of public order, safety, and the equitable sharing of facilities, exercise reasonable control over when, where and under what conditions public meetings may be held on public property but to deny to the people all use of the people's property for the public discussion of specified subjects is an unconstitutional interference of rights expressly guaranteed by both state and federal constitutions. Relying entirely on the facts which this record presents, it appears that Milwaukee county's ordinance is void, as in conflict with both constitutions, and the conviction under it is likewise void and must be set aside."

The constitutional prohibition of joinder of church and state is not controlling here. If a public park dedicated by law and regulation to community purposes by the state cannot be so used by a religious group, then by force of the same reason the public streets could be kept back from use by such religious group. The doctrine of separation of church and state ordained in the First Amendment should not be distorted so as to become an abridgment of liberty. It would result in just that if the construction contended

by the state is accepted here. Since public streets cannot be withheld from religious organizations for exercise of their constitutional rights of free speech, then by force of the same reason public parks that are open for community meetings may be used and cannot be denied to such groups for public meeting purposes.

The contention if made by the State of Rhode Island in this case, that use of the public park for the public meeting and delivery of the talk is a violation of the Constitution because it is appropriation of public funds should not be considered seriously. It is such a slight and inconsequential appropriation as to be unworthy of notice. The doctrine of *de minimis* applies here.

The Court is referred to many cases involving the use of public schools for religious assemblies where the rule of *de minimis* has been applied. The identical argument that has been made here by the state was made in those cases. In the decisions various state courts have held that the use of the school for religious assemblies at times when the school buildings are not used for school purposes is not sectarian use in violation of the Constitution. These holdings were made in decisions rendered prior to the passage of the "Civic Center Acts", which permitted the use of schools for such purposes throughout the country. See *Nichols* v. *School Directors*, 93 Ill. 61; *School Directors* v. *Toll*, 149 Ill. App. 541; *Hurd* v. *Walters*, 48 Ind. 148; *Baggerly* v. *Lee*, 37 Ind. App. 139, 73 N.E. 921; *Townsend* v. *Hagan*, 35 Iowa 194; *Davis* v. *Boget*, 50 Iowa 11; *Gibbert* v. *Dilley*, 95 Neb. 527, 145 N.W. 999; *Greenbanks* v. *Bantwell*, 43 Vt. 207; *Lagow* v. *Hill*, 238 Ill. 428, 87 N.W. 369.

The use of the school building as an assembly place for racial and religious groups under statutes permitting school trustees to permit the use of schoolhouses, when not in use for school purposes for meetings, entertainments, and occasions where admission fees are charged, if such meetings or entertainments are not under exclusive control

and proceeds are not applied for the benefit of a religious sect or denomination or a fraternal or exclusive society, was held not to be unlawful in *Lewis* v. *Board of Education,* 157 Misc. 520, 285 N.Y.S. 164 (modified in other respects in 247 App. Div. 106, 286 N.Y.S. 751, appeal dismissed 276 N.Y. 490, 12 N.E. 2d 172). The court said:

"The manifest vice of the plaintiff's position is that he has confused the racial and religious affiliations of the users of the school buildings with the purpose for which the buildings are used. The restrictions relate to the use. . . . Rather than inimical to the educational policy of the State, or subversive of legitimate use, it is a wholesome thing to have the school buildings, which are maintained at large expense by the taxpayers, used for the purposes and by the groups whose exclusion is here sought. It is the use to which the school buildings are put, and not the identity of the users, that is decisive of the lawfulness of the use."

In *Nichols* v. *School Directors,* 93 Ill. 61, 34 Am. Rep. 160 (1879), it was held that a statute authorizing the directors to grant the temporary use of a schoolhouse, when not occupied by school, for religious meetings, and for such other meetings as the directors might deem proper, and the act of a school district in granting the use of a schoolhouse for religious meetings, was authorized, and did not contravene a constitutional provision that no person should be required to support a place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship, or a provision which forbade any school district from making an appropriation in aid of any church, or for sectarian purposes, or a provision which required all school property to be faithfully applied to the object for which such gifts or grants were made. The court said:

"It seems to us a very strained interpretation to attempt to bring the present case within the reach of either one of the above constitutional provisions. The latter one relates

to the subject of a gift or grant, which this schoolhouse is not shown to be, and if it were, it is not perceived wherein an incidental use of the house for the holding of religious meetings, not in any way interfering with school purposes, would in any reasonable sense be inconsistent with its faithful application to the object of the gift or grant. The second provision respects the making of an appropriation or payment from some public fund in aid of any church or sectarian purpose, and it cannot be claimed that this contemplated use of the schoolhouse is such. In what manner, from the holding of religious meetings in the schoolhouse, complainant is going to be compelled to aid in furnishing a house of worship and for holding religious meetings, as he complains in his bill, he does not show. We can only imagine that possibly at some future time he might, as a taxpayer, be made to contribute to the expense of repairs, rendered necessary from wear and use of the building in the holding of religious meetings. A single holding of a religious meeting in the schoolhouse might in that way cause damage in some degree to the building, upon the idea that continued dripping wears away stone, but the injury would be inappreciable. As respects any individual pecuniary expense which might be in this way involved, we think that consideration may be properly disposed of under the maxim, 'De minimis,' etc. The thing contemplated by the constitutional provision first above named was a prohibition upon the legislature to pass any law by which a person should be compelled, without his consent, to contribute to the support of any ministry or place of worship. Such a matter as the subject of complaint here we do not regard as within its purview. Religion and religious worship are not so placed under the ban of the Constitution that they may not be allowed to become the recipient of any incidental benefit whatsoever from the public bodies or authorities of the state. That instrument itself contains a provision authorizing the legislature to exempt property used for reli-

gious purposes from taxation; and in that manner the indirect supporting of places of worship. In the respect of the possibility of enhanced taxation therefrom, this provision of the Constitution itself is even more obnoxious to objection than this permission given by the school directors to hold religious meetings in the schoolhouse. There is no pretense that it is in any way an interference with the occupation of the building for school purposes." (93 Ill. 61, 34 Am. Rep. 160)

The doctrine of *de minimis* was followed in *State* ex rel. *Conway* v. *District Board,* 162 Wis. 482, 156 N.W. 477. In that case it was held that the offering of a prayer by a Catholic priest or Protestant minister at a public school graduation exercise is not sectarian instruction in violation of the Constitution.

The doctrine of *de minimis* should be applied here. It was applied by the Court in *Everson* v. *Board of Education,* 330 U.S. 1, and *Zorach* v. *Clauson,* 343 U.S. 306, with which compare *Costigan* v. *Hall,* 249 Wis. 94, 23 N.W. 2d 495 and *State* ex rel. *Van Straten* v. *Milquet,* 180 Wis. 109, 192 N.W. 392. See also "Separation of Church and State in the United States" (1950 Wis. L. Rev. No. 3, pp. 452-453, 455) and "Due Process and Disestablishment" (62 Harv. L. Rev. No. 8, pp. 1343-1344).

The United States Constitution guarantees freedom of assembly. No exception of religious assembly was written into the Constitution. If the framers of the Constitution intended to exclude religious assembly from the protection written into the First Amendment, they would have written the exemption into the Amendment. It is absolutely not permitted for a state or city, or their officials, executive, legislative or judicial, to amend the First Amendment by writing into it an exemption or exception which does not appear in the plain language contained in the amendment. If the freedom-of-assembly guaranty in the First Amendment makes secure the right to hold meetings of other kinds

in a public park, it likewise makes secure the right to hold religious meetings therein.

From the beginning of Christianity the streets and parks have been used as places of religious assembly. See first part of argument under Point One of the brief in the companion case of *Poulos* v. *State of New Hampshire*, No. 341, October Term, 1952. See also the Appendix to this brief, printed separately.

It must be assumed that the writers of the Constitution had these historic religious uses of public assembly in mind to include within the guarantee of freedom of assembly when it was written into the First Amendment. This is one of the appropriate uses that is entitled to claim the benefit of this Court's statement in *Hague* v. *C.I.O.*, 307 U.S. 496, at pages 515-516. See also *Jamison* v. *Texas*, 318 U.S. 413, 416.

The doctrine of separation of church and state ought properly to be limited to the boundaries fixed by the framers of the First Amendment. What the authors had in mind was the prohibition of a state church; they intended to exclude any religion from being aided or supported by public funds. The authors of the Amendment did not intend to exclude religion from the benefits of freedom of speech and assembly provided for in the First Amendment. In fact, it has been declared that religion occupies a favored position in the law. It is a well-known fact that the states have explicitly provided that places of public worship shall be exempt from taxation. The Supreme Court of the United States has declared that this is a Christian nation. *Holy Trinity Church* v. *United States*, 143 U.S. 457, 471.

It would be unreasonable to suppose or to contend that the framers of the First Amendment had in mind discriminating against the religious organizations in holding public assemblies. The interpretation of the First Amendment contended for by the state requires this Court to discrimi-

nate against religious and political assemblies in favor of all other types of assemblies. This Court should not write into the First Amendment a discrimination against religious assemblies under the guise of the sophisticated doctrine which is an unlawful stretching of the principle of the separation of church and state. A factitious conclusion would be reached by so doing, which is forbidden by the Constitution. Indeed religious organizations would be discriminated against and the Court would thus misinterpret the guaranty of freedom of assembly appearing in the First Amendment. Compare *Zorach* v. *Clauson*, 343 U.S. 306, where this Court held valid the released-time public school program of New York. It was said that this release from school to attend religious instruction was not barred by the separation clause of the First Amendment.

There has been no appropriation of Slater Park by Jehovah's witnesses. They have not excluded other organizations from the use of the park. Their use of the park is only incidental and synchronizes with the use of the park by all other organizations in Pawtucket for recreational and other purposes. The so-called appropriation of public funds for a religious use by use of the park for holding religious services is so slight and inconsequential and incidental as to be unworthy of notice by this Court in considering the so-called applicability of the doctrine of separation of church and state.

It is respectfully submitted that the proper holding by this Court should be that religious assemblies stand on the same strong basis under the First Amendment as do assemblies by any other group for any other purpose in a public park. This Court should hold that the use of the park for a religious service is proper and within the strong protecting shield of the First Amendment. The Court should conclude that the ordinance, on its face and as enforced and construed by the City of Pawtucket, abridges the rights of the appellant to freedom of speech, assembly, worship and

conscience, contrary to the First and Fourteenth Amendments to the United States Constitution.

The court below unlawfully injects the use of the sound device into the question to be decided in this case. That element is entirely irrelevant. There was no objection to the use of the sound device at any time. The arresting officer testified that it was a lawful and peaceful use of the park, except for the fact that a religious meeting was prohibited. [18-19] The complaint did not charge appellant with unlawfully using a sound device. It charged him with addressing a religious assembly contrary to the provisions of the ordinance. The ordinance does not deal with the use of sound devices.

This Court has frequently held that abuses of the exercise of the right do not justify laws which prohibit or censor the exercise of the right itself. To be valid an ordinance punishing for the use of a sound device in a loud and raucous manner must deal with the abuse of the use and not censor or prohibit the use. Compare *Kovacs* v. *Cooper*, 336 U.S. 77 with *Saia* v. *New York*, 334 U.S. 558. The court below did not have a narrowly drawn zoning ordinance like the Pennsylvania courts had in *Commonwealth of Pennsylvania* v. *Geuss*, 168 Pa. Super. 22, 76 A. 2d 500 and 368 Pa. 290, 81 A. 2d 522, appeal dismissed *sub nomine Geuss* v. *Pennsylvania*, 342 U.S. 912, which is cited and relied upon by the court below.

There was not an attempt to zone the parks of Pawtucket so as to prohibit a religious meeting in this particular park. The ordinance here prohibited religious and political meetings in all parks of the city. There were no parks anywhere in the city where a religious or political meeting could be held. Such meetings were banned in all public parks in the city.

The court below implies that the City of Pawtucket had limited the dedication of the park. It is said, however, that Slater Park "has been maintained as a public park". Being

a public park, it was open for all park purposes (including religious and political speeches) in the absence of a specific limitation in the deed to the city or a restricted dedication confining the use to recreation and rest and excluding religious and political meetings. Since there has been no such limitation as a matter of fact it cannot be grafted on to the use of the public park by judicial amendment of the facts. This ruling amounted to an ex post facto law.

A patent inconsistency appears on the face of the opinion of the court below in a statement made which also is contradicted by the facts in the case. The court says that a person using the park for recreation is entitled not to have another person destroy his "rights to use the park for its dedicated purposes of rest and recreation". [8] In the first part of the opinion the court stated that mere assembly could be held "without unduly interfering with the use of the park by others". [2] It was stipulated in this case that there was space in the park "for assemblies of these kinds and that assemblies can be held without interfering with these other activities". [14] The undisputed testimony of the appellant was that the holding of the assembly was at a place in the park where it did not interfere with the other uses of the park by other persons at the same time. He also testified that the group he spoke to was out of sight of any other group using the park for other purposes. [18-19, 28-29]

The interference of the use of the park by other persons was a fact that had to be proved by the prosecution. There was no such proof received. There is no inference that can be drawn from the testimony that the holding of the assembly and the giving of the talk by the appellant in any way interfered with the use of the park by others. Since the state failed to prove that the use of the park interfered with the rights of others, it is beyond the constitutional authority of the court to find or infer that the use did interfere with the other uses of the park. See *Busey* v. *District of Colum-*

bia, 78 App. D.C. 189, 138 F. 2d 592 at page 595; *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 639; *Thomas* v. *Collins*, 326 U.S. 516, 529-530; *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153. The use of the sound device to address the 400 persons in the audience did not *per se* constitute interference with the rights of others in the park who were not attending the assembly. *Saia* v. *New York*, 334 U.S. 558.

The vehicle used by the court below collided head-on with the standing decisions of this Court, when that court held that a prohibitory ordinance was regulatory. Regulation is confined to time, place and manner of the exercise of the right. *Schneider* v. *New Jersey*, 308 U.S. 147; *Cantwell* v. *Connecticut*, 310 U.S. 296. An outright prohibition of the exercise of the right is not regulation. Laws prohibiting the exercise of the rights guaranteed by the Constitution are not valid. Mr. Justice Reed for a majority of the Court in the defunct decision styled *Jones* v. *Opelika*, 316 U.S. 584, said: "Ordinances absolutely prohibiting the exercise of the right to disseminate information are, *a fortiori*, invalid." (316 U.S. at pages 505-506) This case was reversed in 319 U.S. 103, but this particular holding was not.

Prohibition is regulation only when the ordinance deals with the abuse of the exercise of the right. *Kovacs* v. *Cooper*, 336 U.S. 77, is an example of this. There, without reversing *Saia* v. *New York*, 334 U.S. 558, the Court held valid a law which prohibited loud and raucous noises emitted from a sound device on the streets. The ordinance here is not narrowly drawn so as to prohibit an abuse of holding assemblies and giving religious and political talks in a public park. There is no abuse shown. It was not contended in this case that there was an abuse of the right.

The state and the court below are confronted with a record where it is stipulated that the assembly was peaceful and lawful in all respects save and except for the fact that

it was a religious assembly and a religious talk was given to the group in violation of the ordinance.

The court below struck another discordant legal note. The symphony in the field of civil liberties was marred in the holding that it was necessary to find beyond a reasonable doubt that the ordinance was unconstitutional. It is submitted that in the case of civil liberties guaranteed by the First Amendment there is no presumption of validity but there is a presumption of invalidity unless the state claiming the right to abridge those liberties, shows to the satisfaction of the court that the ordinance is valid. (*Busey* v. *District of Columbia*, 78 App. D.C. 189, 138 F. 2d 592, 595; *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624; *Thomas* v. *Collins*, 326 U.S. 516, 529-530; *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153.)

Conclusion

For the reasons stated, the judgment below should be reversed and the prosecution ordered dismissed.

Respectfully submitted,

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

Counsel for Appellant

December, 1952.

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 340

WILLIAM B. FOWLER, APPELLANT,

vs.

STATE OF RHODE ISLAND

APPEAL FROM THE SUPREME COURT OF THE STATE OF RHODE ISLAND

APPENDIX TO BRIEF FOR APPELLANT

HAYDEN C. COVINGTON

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APPENDIX TO BRIEF FOR APPELLANT

The quotations and references printed below from various publications establish the historic propriety of street and park preaching in European and Anglo-American history and religion. They run all the way back in secular history to King Ethelbert A.D. 597, and in Bible history to Noah at the time of the great flood and to Enoch, the first preacher of righteousness. These publications show that street and park preaching were the chief instruments of the Reformation and of men like Luther, Wesley, Huss, and Calvin.

I.

In J. Benson Hamilton's pamphlet, *Empty Churches and How to Fill Them,* New York, Phillips and Hunt, 1879, the need of street and park preaching is stated, "For reasons that need no explanation a large class of our people have a prejudice against our churches. They will not attend divine service in them whatever may be the attraction. To such the gospel must be preached by the way-side, on the street corner, at the sea-shore, in the mountain, in the woods." (p. 64)

II.

Edwin Hallock Byington, in his treatise, *Open-air Preaching,* Hartford, Connecticut, Hartford Theological Seminary, 1892, gives a complete history of street and park preaching in Europe, Britain, and the United States. He says:

> "Open-air preaching is not one of the 'new methods'. It was the original way of extending among men the revealed will of God. Not only is it 'as old as preaching itself' but for centuries it was the only kind of preaching. 'We are at full liberty to believe,' says Spurgeon, 'that Enoch, the seventh from Adam, when he prophesied, asked for no better pulpit than the hillside, and that Noah as a preacher of righteousness was willing to reason with his contemporaries in the shipyard.'" (p. 9)

> "Open-air preaching certainly has played a prominent part in the extension of the Church. It is the easiest and most effective way of pushing Christianity into new territory. Without it missionary work would be crippled, and all advance would be slow and uncertain. It ever has been the speediest method of reaching those outside the influence of the Church." (p. 25)

This book shows that one of the greatest events in early English missionary history occurred A.D. 597 when King Ethelbert attended service held on the Isle of Thanet, near the mouth of the Thames. This religious service was held in the open air. He was kindly disposed toward the missionaries. He said: "I will . . . not forbid you to preach, and convert as many as you can to your religion." (p. 18) This gave impetus to the open-air missionary work in Britain.

Mr. Byington gives the account of a typical public preacher, during the Reformation, at Worms: " . . . taking his stand on a rudely constructed pulpit in a square thronged with an immense multitude [he] proclaimed the glad tidings with persuasive earnestness. If the authorities showed a disposition to interfere, the people dispersed in an instant, hastily carrying off their pulpit; but no sooner had the officers of authority passed by than they again erected their pulpit." (p. 33)

Martin Luther is reported having an audience of 25,000 at Zwickau's market place. John Huss spoke at the public places of congregation such as the market places, streets and commons. (pp. 33-40) The book further shows that Wesley was active as an open-air preacher and that he preached in the parks and on the streets. He considered the world as his parish. (p. 71) Byington states: "The value placed by Wiclif [1320-1384] himself on the work done by these open-air preachers is shown by what he wrote for their guidance and in their defense." (p. 32)

Facts of history pointed out by Mr. Byington show that during the middle ages, and especially during the Reformation throughout all of Europe, the missionaries preached by the roadside. (pp. 19-21) To counteract the effect of the public preaching by the Protestants, "Rome sent forth her own open-air preachers, who overcame their influence by opposing them before the people in the street and market-place, and by attacking, in the name of the Church, some

of the evils denounced by Peter, Henry, Waldo and their followers . . . " (p. 29)

Byington continues:

> "There was Robert, founder of the Cistercian order of monks, who received from Pope Urban II permission to preach everywhere. As he traveled from town to town and from province to province, he did not regard his permission as limited to Churches, and preached on the highways and in the forests." (p. 30)

Byington also calls attention to the historical fact that St. Francis of the Catholic Church began his missionary work preaching in the streets of Assisi, and that Norbert, founder (A.D. 1120) of Premonstratensians began his work in a similar way. Further he states:

> "Of St. Dominic it is said that he preached to whatever people he met . . . along the highway." (p. 30) "Whatever we may think of its accuracy, the following statement by a Roman Catholic writer is suggestive: 'He is not a very profound student of history who does not know that Christian society was saved from falling into Lutherism by Pope Gregory the 9th sending Dominican and Franciscan preachers to tramp around the cities and villages of Europe, with hearty encouragement, to preach wherever they could, and with his full permission to set up an altar and say mass out of doors, indoors, by the roadside, under the trees, in a word, anywhere, if by such means they could readily assemble a crowd of people and preach to them.' Whether their influence was for good or for evil, the open-air preachers sent forth by the Romish Church for several centuries certainly were a tremendous power." (p. 31)

"At Armstadt, Gaspard Gittol, an Augustine friar, preached in the market-place." (p. 33)

Byington states that, "everything is brought to a man except the Gospel." (p. 72) Yet, God sent the "prophets to the people, not the people to the prophets". (p. 73). He also reproduces paintings of park preaching in Mildmay Park, London (p. 98) and in Regent's Park, London (p. 60).

In the introduction to Byington's book by Mr. A. F. Schauffler this statement is made:

> "Now if this matter of outdoor preaching were a new or an unscriptural thing, we might well pause and think it over very carefully before trying it. But since it is 'as old as the hills', and has abundant scriptural warrant, and the personal sanction of our Master, why under the sun should anyone pause for a moment? I fancy I see the Apostle Paul in a modern ministers' meeting . . . his remarks . . . 'I made a great mistake, and if I had my work to do over again I would not preach from the steps of the Tower of Antonia, or from Mars' Hill.' Perish the thought! I rather fancy he would utter some burning words about the lethargy of the modern Church in not taking advantage of every opportunity to make known the Gospel of the blessed Lord. . . . in modern times street-preaching has been abundantly used of God for the salvation of men. . . . In London I have seen street-preaching time and again. . . . In New York this same method has been adopted. . . . This I do with all my heart . . . commend the practice to all who wish to obey their Master's injunctions, and 'go out into the highways and hedges and compel them to come in.'" (pp. 6, 7, Introduction)

III.

Arthur T. Pierson in his book, *Evangelistic Work*, New York, The Baker and Taylor Company, 1887, reviews the street and park preaching of great evangelists in Britain and the United States. He covers, among many others, the life of George Whitefield (1714-1770) who was known as "the field evangelist".

He shows how Whitefield began his street and park ministry. The bishop locked him out of the church and as a result Whitefield retreated to the adjacent yard. The book states that "he was driven into the fields by the action of the ecclesiastics". (p. 173) After that he preached more than 18,000 sermons during a period of thirty years, both in the United States and in England. A few of his assemblies are cited on page 173 of this book. At Philadelphia he had 20,000, at Boston Common he had 30,000, and at Moorfield he had 60,000. The following quotation describes his activity as a preacher in the parks of his day:

> "He was *driven to the fields* by the action of the ecclesiastics at Bristol, shut out from the Churches, the taunt was flung at him, that if he would convert the heathen he might try his hand upon the Kingswood colliers. He took up the challenge, and on February 17, 1739, he first attempted to speak to these wild men on that wild common near Bristol [England]. A hundred of them came . . . but soon increased to twenty thousand." (p. 174) "Whitefield accepted the itinerant life of a field preacher, and led into the same path his illustrious contemporary, John Wesley." (p. 176)

Pierson shows that to this preacher the open field was his sanctuary. (p. 174)

IV.

During the last half of the 19th century street and park preaching in New York city was a common practice. See the report given by a leading street preacher in New York; Dr. John W. Kennion, to the Mayor of New York city. It is printed in pamphlet form, entitled "Report of Four Years' Labor of Love and Deeds of Mercy", Brooklyn, Eagle Job and Book Printing Department, 1880. He referred to open-air ministry as aggressive Christianity. Among other things he said in his report:

> "I had an interview with Mayor Wickham, in October, 1876, received his permission, endorsed by the Police Superintendent Walling, to preach the Gospel on the streets of Manhattan Island." (p. 7)
>
> "I have been engaged in lifting up Christ on the streets of our City . . . and during this time the public at large have almost unanimously conceded its necessity, utility and value as the mode best adapted to meet the requirements of the 'masses' who are without the glorious Gospel of Jesus Christ, and are not in circumstances to attend those places where the sound of salvation's trumpet is regularly heard. These street services reach that class of persons in the substrata of your community who are not approached or reached by any of our boards, associations, missionaries, . . . " (p. 3 of Introduction)

In his report Dr. Kennion states that his street services, "are often attended by large numbers of persons of all grades of society and of all denominations, including Protestants, Jews, Catholics, Rationalists, . . . " (p. 10)

He further states:

> "It is really surprising and gratifying to witness

> the avidity with which the multitude grasp at the hundreds of excellent 'seeds' in the line of wholesome tracts, generously furnished by the agents of the American Tract Society, regularly distributed before and after each service." (p. 11)

In conjunction with the street-preaching campaign of Dr. Kennion the New York *Herald* of July 7, 1879, made this comment:

> "Street preaching has begun again. It has its merits; the air of the sanctuary in which such sermons are given is sure to be good, so that the hearers are not compelled to go to sleep, and there is not much inducement for the worshipers to study each other's clothes and carriages."

One of Mr. Kennion's concluding remarks on the subject of street preaching is found in the poem, "Our Heathen at Home" (p. 24): "We tell them of Jesus on the street."

V.

The seventh Episcopal Bishop of New York, Henry C. Potter, in his book *Sermons of the City,* New York, E. P. Dutton and Company, 1881, shows that it was a common and customary thing to preach on the streets. He states in his book about the preaching methods of Christianity:

> "The new religion turned its footsteps to the market-place (p. 4) . . . it is thus that the religion of Christ has worked from the beginning. If it has triumphed anywhere, or at all, it has triumphed because it has made its appeal to the individual soul in the street, in the home, in the market-place, wherever it could find it—pressing upon it an individual message." (p. 7)

VI.

Thomas S. Bacon, in a pamphlet entitled "A Defense of Street Preaching", New Orleans, Louisiana, Sherman, Wharton & Company, 1856, reviewed the subject of public preaching in the streets and parks of Louisiana. He showed that the Protestant Episcopal Church early in England and in the United States made use of this instrumentality. Among other things he says:

> "The blessed Reformation was much helped forward in our mother country and mother church by zealous preaching in the open air to crowds of people all over the land." (p. 4)

He emphasized that street and park preaching have always been proper and accepted methods of evangelism in the nations of Christendom and Judea.

VII.

George Charles Smith, in the pamphlet *Preaching in the Open Air,* London, W. K. Wakefield, 1829, shows that the Baptist, Methodist, Presbyterian, Episcopal, and other churches, have from time immemorial employed street and park preaching. He points out that in England and Scotland even openings were knocked in the walls of the churches and pulpits built there so as to allow the ministers and bishops to preach to great crowds in the streets and adjacent grounds where the churches were too small to accommodate the crowds. See pages 4, 9, 10, 12, 25-28.

VIII.

See also a 55-page pamphlet by Greville Ewing entitled "A Defense of Itinerant and Field-Preaching", Second Edition, which was published by George Gallie at Glasgow in 1882.

This is a print of a sermon given by Greville Ewing, a clergyman, on December 24, 1797, in Lady Glenorchy's

Chapel in Edinburgh, Scotland. His sermon defended street and park preaching as necessary to meet the needs of the people. In it he stated that "the practice with regard to the preaching as described in our text, is not only warranted by ancient example but is in itself right and suitable, and ought still to be followed as highly expedient and necessary." (p. 19)

On page 33 of this pamphlet he states: "There is no faithful pastor of any denomination, whose hands will not be strengthened in the work of the Lord, by the preaching of the gospel in the streets and in the fields." (p. 33)

In the sermon he reviewed the history of street and park preaching beginning with the early prophets of the Bible and ending with the Protestant preaching in England and Scotland in the year 1797.

IX.

The common practice of using the parks as places of religious assembly is demonstrated by the recent Christmas-eve celebration of mass, attended by ten thousand persons, on Boston Common by the Roman Catholic Archbishop of Boston. According to a special dispatch from Boston to the New York *Times,* published on Thursday, December 25, 1952 (late city edition) at page 20, it is stated:

> "Boston, Dec. 24—The Most Rev. Richard J. Cushing, Roman Catholic Archbishop of Boston, celebrated mass on Boston Common this noon before a pre-Christmas throng estimated by the police at 10,000."

This use was in accordance with the accustomed practice. Historical records of the Boston Common show that "it is a 48 acre tract which was purchased from William (Blaxton) Blackstone in 1634 by the town of Boston and set aside for common use as a cow pasture and military training field, . . . contains the Old Central Burying

Ground . . . The Common is associated with many phases of the city's history. On it freedom of speech is a tradition. Here orators and would-be orators expatiate almost daily on the ills of the world and how to remedy them." See *The Encyclopedia Americana,* Vol. 4, pp. 295, 297-298, New York, Americana Corporation, 1942.

X.

In conclusion it is well to consider the poem by Richard Chenevix Tranch, "The Kingdom of God", published in part in *The Oxford Dictionary of Quotations,* London, Oxford University Press, 1941:

"I say to thee do thou repeat
To the first man thou mayest meet
In lane, highway, or open street
That he and we and all men move
Under a canopy of love
As broad as the blue sky above."

Respectfully submitted,

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

Counsel for Appellant

December, 1952.

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 340

WILLIAM B. FOWLER, APPELLANT,

vs.

STATE OF RHODE ISLAND

APPEAL FROM THE SUPREME COURT OF THE STATE OF RHODE ISLAND

REPLY BRIEF FOR APPELLANT

HAYDEN C. COVINGTON

Counsel for Appellant

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Supreme Court of the United States

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MAY IT PLEASE THE COURT:

The appellee says that its law should be sustained because it is limited to activities that may lead to disorder. It does not purport to prohibit an assembly under circumstances where there is a clear and present danger of riot or disorder. If it were such a law and there were proof that a clear and present danger of riot existed, a different question would be here involved. Compare *Terminiello* v. *Chicago*, 337 U. S. 1, with *Feiner* v. *New York*, 340 U. S. 315. The holding of a religious meeting in a park does not *per se* or *ipso facto* present a clear and present danger of riot. See

Sellers v. *Johnson*, 163 F. 2d 877 (C. A. 8th). The law here involved is an outright prohibition of the use of the right and is no prohibition of an abuse of the use of the right, the limit of the police power.—*De Jonge* v. *Oregon*, 299 U. S. 353, 364-365; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Thornhill* v. *Alabama*, 310 U. S. 88, 95-96; *Hague* v. *C. I. O.*, 307 U. S. 496, 515-516.

The State of Rhode Island says that the ordinance permits religious *services* in all parks but it does not allow religious speeches, talks or assemblies. The distinction is one without a difference. Since the Catholics can conduct mass in the park, it is difficult to see how there is no discrimination. Mass is a religious assembly. It involves religious speech by a priest. The words of a Catholic priest convey ideas just like the words of a Protestant minister. This interpretation brings the enforcement of the law into collision with the holdings of this Court in *Niemotko* v. *Maryland*, 340 U. S. 268, and *Yick Wo* v. *Hopkins*, 118 U. S. 356.

The state says a prayer may be given and that it would not be a violation of the law. A prayer, like a speech, is heard by the people assembled as much as is a speech to a religious group. A prayer may be as provocative, if not more so, than a speech. Merely because it is a prayer does not change the nature of the message heard by the listener. There are records of provocative prayers in the Bible, where the destruction of enemies of Jehovah's people was the object of supplication. Surely, if these provocative and controversial prayers had been given in a park or public place, they would have been as disorderly as an inflamatory speech made to the listeners which appealed to them, on religious grounds, to take action.

It is argued by appellee that the religious talk by appellant was not a part of a religious "service", which (if it were a religious "service") would be permitted. This argument by the State of Rhode Island flies in the teeth of

what this Court said in *Burstyn, Inc.* v. *Wilson,* 343 U. S. 495. See especially note 18, page 505 of the opinion. It is not within the province of the law, under the doctrine of separation of church and state, to say what is or is not a religious service. This Court does not have a religion. The Court knows only the religion of the law. The religion of the law recognizes all personal religions and does not prescribe what is orthodox. The judges of courts cannot say what is or is not a religious service. See *Kedroff* v. *St. Nicholas Cathedral,* 73 S. Ct. 143, at pages 153-154, note 23.

The undisputed evidence showed that the meeting in question was a religious meeting and that a religious sermon was delivered. This made the whole transaction "religious" within the view of this Court and the meaning of the Constitution. If the ordinance could not prohibit a religious service, then it could not stop a religious talk or constitutionally punish one for holding a religious assembly.

The courts are not authorized to proceed to judge the qualifications of a minister of a religious organization on the basis of the personal views of the judges of the court. The Ontario Court of Appeal, in *Donald* v. *Board of Education,* [1945] O. R. 518, said: " . . . it would be misleading to proceed on any personal view on what such exercise might include or exclude." If courts were permitted to judge according to their personal knowledge of what constitutes the duty of a minister of a religious organization, based on the experience and knowledge obtained from association with ministers of popular orthodox denominations, the law would change with the complexion of every judge. In that event every time there should occur a change in the personnel of the court that would give rise to a change in the law. If it is permissible for the judges of a court to decide that a minister, duly ordained according to the custom of his faith and regularly serving as a minister, is not entitled to the benefits of the Constitution because the activity of the minister is not performed in a way with which the judges

are personally familiar and approve of as proper preaching—if this form of judicial determination were permitted in arriving at the construction to be placed upon the Constitution, a Catholic judge could decide that a Presbyterian minister is not a minister under the Constitution and the Baptist judge could decide that a Catholic priest is not a minister of religion within the law. The illustrations could be increased *ad infinitum*. Under such process, instead of being governed by law, the people would be governed by men. The protection of the Constitution would operate according to the swing of the pendulum of decisions as the religious complexion of the court changed with the appointment of judges.

It has been judicially declared that were "the administration of the great variety of religious charities, with which our country so happily abounds, to depend upon the opinion of the judges, who from time to time succeed each other in the administration of justice, upon the question whether the doctrines intended to be upheld and inculcated by such charities, were consonant to the doctrines of the Bible; we should be entirely at sea, without helm or compass, in this land of unlimited religious toleration". —*Knistern* v. *Lutheran Churches,* 1 Sandf. Ch. 439, 507 (N. Y.).

All religions, however orthodox or heterodox, Christian or pagan, Protestant or Catholic, stand equal before the law which regards "the pagan and the Mormon, the Brahmin and the Jew, the Swedenborgian and the Buddhist, the Catholic and the Quaker as all possessing equal rights". —*Donahue* v. *Richards,* 38 Me. 379, 409. Cf. *People* v. *Board of Education,* 245 Ill. 334, 349; *Grimes* v. *Harmon,* 35 Ind. 198, 211.

Protection is therefore afforded not only "to the different denominations of the Christian religion, but is due to every religious body, organization or society whose members are accustomed to come together for the purpose of

worshipping the Supreme Being". (*State* ex rel. *Freeman* v. *Scheve*, 65 Neb. 853, 879) It is now clear that the legislative, executive and judicial policy concerning religious organizations, beliefs, and practices is one of masterly inactivity, of hands off, of fair play and no favors. (*People* v. *Steele*, 2 Bar. 397) "So far as religion is concerned the *laissez faire* theory of government has been given the widest possible scope."—*State* ex rel. *Freeman* v. *Scheve*, *supra*.

"History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities."—*Minersville* v. *Gobitis*, 310 U. S. 586.

"No chapter in human history has been so largely written in terms of persecution and intolerance as the one dealing with religious freedom. From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox religious beliefs. And the Jehovah's witnesses are living proof of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion in unconventional ways is still far from secure. Theirs is a militant and unpopular faith, pursued with a fanatical zeal. They have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the resurrection and enforcement of little used ordinances and statutes. See Mulder and Comisky, 'Jehovah's Witnesses Mold Constitutional Law,' 2 Bill of Rights Review, No. 4, p. 262. To them, along with other present-day religious minorities, befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom." —*Prince* v. *Commonwealth*, 321 U. S. 158.

Even clergymen are incompetent to give any help to the Court in this matter, in which the Court must decide a legal

question, the invalidity of the ordinance, as is well demonstrated by the holding of the United States Court of Appeals for the Second Circuit, in *United States* v. *Balogh*, 157 F. 2d 939. In that case one of Jehovah's witnesses who was preparing himself for the ministry claimed exemption from the draft act as a student. In considering and in denying him his claim for exemption the tribunal referred him to a panel of theologians (orthodox clergymen) and thereafter considered the report and opinions of the panel. The Court held that the action of the tribunal was invalid. It was decided that the beliefs, practices and structure were not subject for opinion by expert orthodox clergymen and that the only person qualified to give opinion on such unorthodox and heterodox group would be one trained and qualified by the group itself or at least one who had studied the organization from the inside. The court said, among other things, that "it would be a misapprehension to exclude such sects from the purpose of Congress, to which we are to impute, not only a tolerance of, but a positive concern for, the preservation of all creeds that can be grouped within the widely comprehensive term 'religion' . . . but, even though they were Protestant ministers, they could have no proper part in an inquiry involving Jehovah's Witnesses".

It seems obvious that, for purposes of decision in this case, the Court must hold that the talk of appellant was a part of a religious service, which appellee admits the ordinance cannot stop and which stopping in this case violates the Constitution.

The appellee disingenuously casts aside all the permit cases cited by appellant. Then it inconsistently relies on a permit decision, *Davis* v. *Massachusetts*, 167 U. S. 43, which is now defunct as an authority. Why this old and overruled

decision is in point and the later permit decisions like *Niemotko* v. *Maryland*, 340 U. S. 268, and *Kunz* v. *New York*, 340 U. S. 290, are not in point cannot be justified or sustained by law or reason.

Respectfully,

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York
Counsel for Appellant

January, 1953.

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Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 340.

WILLIAM B. FOWLER,
Appellant,

v.

STATE OF RHODE ISLAND,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

BRIEF FOR APPELLEE.

WILLIAM E. POWERS,
Attorney General of the State of Rhode Island,
RAYMOND J. PETTINE,
Assistant Attorney General of the State of Rhode Island.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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STATE OF RHODE ISLAND,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF RHODE ISLAND.

BRIEF FOR APPELLEE.

This appeal by the said William B. Fowler is on a decision of the Supreme Court for the State of Rhode Island entered August 12, 1952, overruling the defendant's exception and affirming the decision and conviction of the Superior Court for the said State of Rhode Island.

Opinions Below.

Two opinions were written by the Court below in this case. The first opinion answered certified questions, holding that the ordinance in question was valid. 83 A. 2d 67.

This opinion appears in the record (R. 43-56). The second opinion gave the reasons for the affirmance of the conviction entered following the return of the answers to the certified questions. This opinion is reported at 91 A. 2d 27. It also appears in the record (R. 1-10).

Jurisdiction.

On August 22, 1952, the appellee and the appellant stipulated that a substantial federal question is involved that ought to be determined by the Supreme Court of the United States. The appellee did not, however, agree that the ordinance is invalid, either on its face or as construed and applied, it being understood that it will contend before the Supreme Court of the United States that the ordinance is, in all things, constitutional upon its face and as enforced against the appellant.

The judgment of the Supreme Court of Rhode Island affirming the judgment of the Superior Court was entered August 12, 1952 (R. 9). The judgment became final on August 12, 1952 (R. 9). The petition for appeal to this Court was allowed within ninety days after the judgment became final (R. 56). The appeal to this Court was timely allowed (R. 58). Probable jurisdiction was noted by this Court on November 10, 1952 (R. 62).

This case presents a state of facts within the jurisdiction of this Court by virtue of 28 U.S.C., Sup. II (1946 edition), sec. 1257, where an appeal may be taken in any case when there is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity. Also note Act of Congress of January 31, 1928, c. 14, 45 Stat. 54, and Act of Congress of April 26, 1928 c. 440, 45 Stat. 466.

Question Presented.

Does the ordinance in question, which reads that—

> "No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park"—

violate the Federal Constitution in that it abridges the right of freedom of assembly, freedom of speech and freedom of worship, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States?

The question was raised by motions to quash and dismiss filed in the Superior Court of Rhode Island (R. 10, 12, 21, 40). This question was answered in the negative by the Superior Court and by the Supreme Court of Rhode Island (R. 12, 21, 41).

Statute Involved.

This case draws into question the validity of one of sixteen sections of an ordinance of the City of Pawtucket, approved April 17, 1916, c. 149, which particular section, being section 11, provides as follows:

> "Sec. 11. No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park."

The entire ordinance was received in evidence as an exhibit (R. 14). It is printed in the record (R. 54-56).

Constitutional Provisions Involved.

The First Amendment, relied upon in this case, reads as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The pertinent parts of the Fourteenth Amendment which appellant relies upon read as follows:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of Case.

On September 3, 1950, William B. Fowler, defendant, was charged by complaint and warrant, among other things, as follows:

> "On the 3rd day of September A. D. 1950, with force and arms, William B. Fowler, alias John Doe, laborer, of said Pawtucket, did violate Section 11 of Chapter 149 of the ordinance of the City of Pawtucket in that

he did address a religious meeting in a public park, to wit, Slater Park against an Ordinance of the City of Pawtucket, and against the statute and the peace and dignity of the State."

After a trial in the District Court of the Tenth Judicial District at Pawtucket, Rhode Island, the defendant was convicted and sentenced to pay a fine of $5 and costs. The defendant duly appealed to the Superior Court for the Counties of Providence and Bristol, Rhode Island (R. 13).

On January 10, 1951, the said Superior Court certified the constitutional questions involved on the appeal to the Supreme Court for the State of Rhode Island (R. 1, 43-57). On August 10, 1951, in a judgment rendered by a divided Court, the certified questions were answered in the negative. There were dissents of two judges of the Court. The questions certified to the said Supreme Court for the State of Rhode Island were as follows:

"Is Section 11 of Chapter 149 of the ordinances of the City of Pawtucket, approved April 17, 1916, on its face and as construed and applied, unconstitutional because it abridges the rights of the defendant to Freedom of Speech, Freedom of Association, and Freedom of Worship, contrary to the First and Fourteenth Amendments to the United States Constitution?

"Is Section 11 of Chapter 149 of the ordinances of the City of Pawtucket, approved April 17, 1916, contrary to the provisions of Article I of the Constitution of the State of Rhode Island, with particular reference to Sections 3, 10 and 21?"

Following the return of the papers to the Superior Court the case was tried on October 22, 1951, before Mr.

Justice Andrews of the Superior Court of the State of Rhode Island, without a jury, which was specifically waived (R. 12-13).

Before making his plea the defendant made a motion to quash, orally and in writing. The pertinent parts of the motion to quash read:

> "(1) Section 11 of Chapter 149 of the Ordinances of the City of Pawtucket, approved April 17, 1916, on its face and as construed and applied, is unconstitutional because it abridges the rights of the defendant to freedom of speech, freedom of assembly and freedom of worship contrary to the provisions of the First and Fourteenth Amendments to the Constitution of the United States.
>
> "(2) That Section 11 of Chapter 149 of the Ordinances of the City of Pawtucket, approved April 17, 1916, is, on its face and as construed and applied, unconstitutional because it abridges the right of the defendant to freedom of speech, freedom of assembly and freedom of worship, contrary to the provisions of Article I, Sections 3, 10 and 21 of the Constitution of the State of Rhode Island."

The identical grounds were urged in motions to quash and for a judgment of acquittal made at the end of the State's case and at the close of all the evidence and before the decision of the Court, which were denied with exceptions (R. 21, 40, 41).

On October 22, 1951, the Court rendered a judgment convicting the appellant, who was then fined $5 (R. 41).

Each holding of the trial Court was presented on appeal to the Supreme Court of Rhode Island and assigned as error (R. 1, 2, 3, 9). Each federal question presented on this appeal was overruled by the Supreme Court of Rhode

Island (R. 9). A judgment of affirmance was entered (R. 9).

Facts.

It was stipulated and agreed that chapter 149 of the Ordinances of the City of Pawtucket, approved April 17, 1916, provides as follows:

> "Sec. 11. No person shall address any political or religious meeting in any public park; but this section shall not be construed to prohibit any political or religious club or society from visiting any public park in a body, provided that no public address shall be made under the auspices of such club or society in such park."

It was stipulated that Slater Park does have an area of approximately 194 acres; that within the above area are located tennis courts, merry-go-round, bandstand, a lake with rental boats, a baseball field, swings and dandles for children, sixteen fireplaces, animal and bird compounds, extensive formal gardens, natural woodlands and improved roads.

The parties further stipulated that there was sufficient space in the park for assemblies. It was *not* stipulated that assemblies can be held without interfering with other activities (R. 14).

The defendant is a resident of Arlington, Massachusetts, and is a minister of the group known as Jehovah's Witnesses, duly ordained. He acts under the direction of the Watchtower Bible and Tract Society of Brooklyn, the legal governing body of Jehovah's Witnesses (R. 26). He was invited by the Pawtucket company of Jehovah's Witnesses to deliver a Bible discourse, as a visiting minister, to an

assembly in Slater Park in Pawtucket (R. 27). He accepted the invitation and came to the park in Pawtucket, Rhode Island (R. 27).

On September 3, 1950, at 4.05 p.m., in a prominent section of Slater Park, a large group of people, numbering some four hundred persons, gathered for a religious meeting as previously advertised; the defendant Fowler addressed this meeting, using as aids a Bible and notes from a loose-leaf book. The subject was "Pathway to Peace," prepared in part from Scripture. He spoke into a microphone which connected with two loudspeakers; the Pawtucket Police under the supervision of Chief Inspector Vincent A. Hourigan, after listening for a few minutes, arrested the defendant Fowler and charged him with violation of the said ordinance (R. 29, 30, 31).

Jehovah's Witnesses have a regular meeting place in the City of Pawtucket which was not used the day in question (R. 39).

Summary of Argument.

The case at bar is governed by *Davis* v. *Massachusetts*, 167 U.S. 43. The ordinance in question does not interfere with freedom of assembly or speech or prohibit religious worship, but is for the sole purpose of guarding the park from being used for activities that could lead to disorder. The said case of *Davis* v. *Massachusetts*, 167 U.S. 43, has never been overruled, but on the contrary has "always been distinguished without intending to overrule it; and that it still is applicable law in the type of case where the question involves only the defendant's right, as a member of the public, to speak in a manner and under conditions which would violate the equal and correlative rights of other members of the public to a reasonable use of the park for its dedicated purposes" (R. 7). The ordinance is merely a police

regulation with valid regulations that are not discriminatory.

As to the defendant's argument that a religious address may be permitted in a public park without contravening the concept of separation of church and state, it is respectfully submitted that contention is superfluous. The State of Rhode Island readily states that there is nothing in the ordinance which prohibits religious services of any kind from being held in the public parks of the City. There is nothing which prohibits or restricts any individual from offering prayer. It is only an address on such an occasion that is prohibited by the ordinance in question. It is respectfully submitted, therefore, that this Honorable Court is not called upon to decide this constitutional point as briefed by the defendant.

"True liberty cannot exist without public order. In safeguarding our liberties we cannot go to the extreme of making impossible or unduly difficult public order.

Point Made.

The ordinance is constitutional because, both on its face and as construed and applied, it does not abridge the rights of freedom of assembly, freedom of speech and freedom of worship, contrary to the First and Fourteenth Amendments to the United States Constitution; it is a general measure and promotes public comfort and convenience in the use of the park and is a regulation in the interest of all and not a prohibition of freedom of speech, assembly and worship.

Argument.

The State of Rhode Island feels in presenting its argument that it should at the very outset analyze certain of

the more important cases cited by the defendant, as in all of these cases a fundamental premise exists which distinguishes them from the one before this Honorable Court.

Jamison v. *Texas*, 318 U.S. 413: In this case the ordinance made it unlawful "to scatter or throw any handbills, circulars, cards, newspapers or any advertising device of any description, along or upon any street or sidewalk in the City of Dallas." Nothing in that ordinance purported to make it unlawful *to distribute* religious pamphlets, and yet the gravamen of the complaint there, as viewed from the evidence, was directed solely to the defendant's distribution of religious treatises. Moreover, the ordinance in *Jamison* v. *Texas, supra*, differs still further from the one in the instant case in that the ordinance here expressly recognizes the right of religious groups to assemble and nowhere makes it unlawful to distribute religious pamphlets or to hold religious meetings and services (R. 4, 5).

Saia v. *New York*, 334 U.S. 558: Permission had to be obtained from the Chief of Police to use a hand speaker and no standards were prescribed for the exercise of his discretion. As far as this case is concerned the ordinance prohibited the use of the word "loudspeaker" device which casts its sound directly upon streets and public places. A public park was only incidentally involved because the defendant set up his "loudspeaker" in such a place. He was arrested for using a "loudspeaker" in defiance of the ordinance, not for making a public address in the park. The ordinance in question apparently was not invoked by the City to prohibit public addresses to a religious meeting in the park. The Court in its decision held that the City could not prohibit the use of a loudspeaker in the manner provided in the ordinance. This was the question and therefore the decision does not ap-

pear to be relevant to the particular controversy of the case now before this Honorable Court. It is respectfully submitted, however, that this case seems to be questionable because of the decision in *Kovacs* v. *Cooper,* 336 U.S. 77. In said *Kovacs* case there was an ordinance which prohibited the use of "loudspeakers" on the streets and public places of Trenton, New Jersey, and the Honorable Supreme Court upheld said ordinance. Mr. Justice Frankfurter and Mr. Justice Jackson, who had dissented in the *Saia* case, concurred in this decision and the former said it would be "to start with an unreality" to rest the *Kovacs* decision on the *Saia* case. Mr. Justice Jackson said that the *Kovacs* decision repudiated *Saia.*

Hague v. *Committee for Industrial Organization,* 307 U.S. 496, stated that a license was required for public assemblage, administered by a local official who could refuse a permit if in *his opinion* (emphasis ours) the refusal would prevent "riots, disturbances or disorderly assemblage."

Commonwealth v. *Gilfedder,* 321 Mass. 335, states that a permit from certain designated public officials was necessary and the granting or withholding of such a permit was in the uncontrolled discretion of these officials. (It should be noted that the Court did not expressly overrule *Commonwealth* v. *Davis,* hereinafter to be cited.)

Largent v. *Texas,* 318 U.S. 418, states that the dissemination of ideas depended upon approval by an official (the Mayor) issuing a permit if *he* (emphasis ours) "deems it proper or advisable."

Murdock v. *Pennsylvania,* 319 U.S. 105, requires religious colporteurs to pay a license tax "*as a condition to* the pursuit of their activities" (emphasis ours).

Niemotko v. *Maryland,* 340 U.S. 268: In this case the appellants were two members of Jehovah's Witnesses. By

invitation they scheduled Bible talks in the public park. There was *no ordinance prohibiting or regulating* (emphasis ours) the use of the park in question; it was the custom for organizations and individuals desiring to use it for meetings and celebrations to obtain a permit from the park commissioner. Permission was requested and refused. A meeting was nevertheless held, and the appellant was arrested and brought to trial on a charge of disorderly conduct. The Court stated that the conviction could not stand, as there was no evidence of disorder, threats or violence apparent; that the disorderly conduct must have been based on the fact that the appellants were using the park without a permit, *although* there was *no statute or ordinance prohibiting or regulating* the use of the park without a permit. It is true in this case that the Supreme Court has definitely included public parks, as well as highways, within the orbit of its decisions protecting the freedoms of the First Amendment from local abridgment or denial. It is true that the locus of the forbidden act was a public park, but there the similarity to the case before this Honorable Court ends. In the *Niemotko* case there was no ordinance of general application. It was, instead, an act of arbitrary discrimination by an administrative official.

Kunz v. *New York*, 340 U.S. 290:

> "Mr. Chief Justice Vinson delivered the opinion of the Court.
>
> "'New York City has adopted an ordinance which makes it unlawful to hold public worship meetings on the streets without first obtaining a permit from the city police commissioner. Appellant, Carl Jacob Kunz, was convicted and fined $10 for violating this ordinance by holding a religious meeting without a permit. . . .

"Appellant is an ordained Baptist minister who speaks under the auspices of the 'Outdoor Gospel Work,' of which he is the director. He has been preaching for about six years, and states that it is his conviction and duty to 'go out on the highways and byways and preach the word of God.' In 1946, he applied for and received a permit under the ordinance in question, there being no question that appellant comes within the classes of persons entitled to receive permits under the ordinance. This permit, like all others, was good only for the calendar year in which issued. In November, 1946, his permit was revoked after a hearing by the police commissioner. The revocation was based on evidence that he had ridiculed and denounced other religious beliefs in his meetings.

"Although the penalties of the ordinance apply to anyone who 'ridicules and denounces other religious beliefs,' the ordinance does not specify this as a ground for permit revocation. Indeed, there is no mention in the ordinance of any power of revocation. However, appellant did not seek judicial or administrative review of the revocation proceedings, and any question as to the propriety of the revocation is not before us in this case. In any event, the revocation affected appellant's rights to speak in 1946 only. Appellant applied for another permit in 1947, and again in 1948, but was notified each time that his application was 'disapproved,' with no reason for the disapproval being given. On September 11, 1948, appellant was arrested for speaking at Columbus Circle in New York City without a permit. It is from the conviction which resulted that this appeal has been taken.

"Appellant's conviction was thus based upon his failure to possess a permit for 1948."

The Court stated at page 293:

> "It is noteworthy that there is no mention in the ordinance of reasons for which such a permit application can be refused. This interpretation allows the police commissioner, an administrative official, to exercise discretion in denying subsequent permit applications on the basis of his interpretation, at that time, of what is deemed to be conduct condemned by the ordinance. We have here, then, an ordinance which gives an administrative official discretionary power to control in advance the right of citizens to speak on religious matters on the streets of New York. As such, the ordinance is clearly invalid as a prior restraint on the exercise of First Amendment rights."

The State of Rhode Island has taken upon itself to analyze the foregoing cases for the purpose of stressing that in each there is a licensing system which vests in an administrative official discretion to grant or withhold a permit upon "broad criteria unrelated to proper regulation of public places."

In no instance, it is respectfully submitted, does the United States Supreme Court restrict the power of the several States *in the regulation* of public streets and other public places.

It is stressed to this Honorable Court that there is a distinction between an outright prohibition or exercise of discretion and *the right to regulate.*

As shown in the *Niemotko* case, cited above, "The conclusion is inescapable that the use of the park was denied because of the City Council's dislike for a disagreement with the Witnesses or their views" (p. 272).

There was a lack of standards in the issuing of the licenses and the action was completely arbitrary. This is entirely different from the case at bar.

Cox v. *New Hampshire*, 312 U.S. 569, states:

"Appellants are five 'Jehovah's Witnesses' who, with sixty-three others of the same persuasion, were convicted in the municipal court of Manchester, New Hampshire, for violation of a state statute prohibiting a 'parade or procession' upon a public street without a special license.

. . . . . .

"The statutory prohibition is as follows (New Hampshire, P. L., Chap. 145, § 2):

" 'No theatrical or dramatic representation shall be performed or exhibited, and no parade or procession upon any public street or way, and no open-air public meeting upon any ground abutting thereon, shall be permitted, unless a special license therefor shall first be obtained from the selectmen of the town, or from a licensing committee for cities hereinafter provided for.'

. . . . . .

"Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. . . . *Lovell* v. *Griffin*, 303 U. S. 444, 451; *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 515, 516; *Schneider* v. *State*, 308 U. S. 147, 160; *Cantwell* v. *Connecticut*, 310 U. S. 296, 306, 307."

133 American Law Reports, 1404:

". . . civil authority can never concede the extreme claim that police regulations of general application not directed against any sect or creed, however, widely the regulations may be accepted as being reasonable and proper, are constitutionally unapplicable to persons who sincerely believe the observance of such regulations to be 'an insult to Almighty God'."

Schneider v. *State* (*Town of Irvington*), 308 U.S. 147, 160:

"Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, . . . it may lawfully regulate the conduct of those using the streets. . . . . Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion."

Commonwealth v. *Hessler* (1940), 141 Pa. Super. 421.
Manchester v. *Leiby*, 117 F. 2d 661.
State v. *White*, 64 N.H. 48.

An examination of the ordinance discloses that it is an ordinance providing rules and regulations for public parks in the City of Pawtucket. The prohibition therein is not directed at any particular religious group, but is general and applies without question to all such groups and to all political groups as well. The ordinance as a whole represents an exercise of the power which the City Council has over the management and control of municipal

property. Apparently, in the exercise of that power the City Council decided that the City's parks would more certainly serve the purpose of their establishment as areas of rest and recreation if they were not allowed to become forums for either religious or political controversy. It is an ordinance of long standing as evidenced by its date of approval, April 17, 1916, and hence it antedates by many years the recent prominence of the Jehovah's Witnesses in federal litigation. It is a comprehensive ordinance containing fourteen separate sections, each section restricting individuals, and regulates activities which are otherwise legal. The particular section 11 which we are concerned with appears to prohibit only addresses to political and religious meetings. It specifically states that it does not prohibit political or religious clubs or societies from visiting the public parks in a body. It reiterates that no public address be made under the auspices of such a club or society.

Davis v. *Massachusetts,* 167 U.S. 43: (In citing this case the State calls the Court's attention to *Commonwealth* v. *Gilfedder,* 321 Mass. 335, where it may be argued that this overrules the said *Davis* case. This contention the State disputes.) In the *Davis* case it appeared that, pursuant to enabling legislation, the City of Boston adopted an ordinance prohibiting anyone from speaking, discharging fire arms, selling goods or maintaining any booth for public amusement on any of the public grounds of the City except under a permit from the Mayor. Davis spoke on Boston Common without a permit and without applying to the Mayor for one. He was charged with a violation of the ordinance and moved to quash the complaint, *inter alia,* on the ground that the ordinance abridged his privileges and immunities as a citizen of the United States and denied him due process of law because it was arbitrary and unreasonable. His contentions were overruled and he was con-

victed. The judgment was affirmed by the Supreme Court of Massachusetts and was subsequently confirmed in the United States Supreme Court in the opinion cited above. In this case Mr. Justice White, speaking for a unanimous Court, rejected the contention by Davis that the local law under which he was convicted was contrary to the Fourteenth Amendment to the Constitution of the United States, and said:

> "The Fourteenth Amendment to the Constitution of the United States does not destroy the power of the States to enact police regulations as to subjects within their control . . . , and does not have the effect of creating a particular and personal right in the citizen to use public property in defiance of the constitution and laws of the State. . . . The plaintiff in error cannot avail himself of the right granted by the State and yet obtain exemption from the lawful regulation to which this right on his part was subjected by law."

It appears that the facts in the *Davis* case are almost identical with the case before this Court. The fact that the Boston ordinance delegates arbitrary and discriminatory authority to the Mayor does not, by any means, make it less objectionable than the Pawtucket ordinance. On the contrary, the Pawtucket ordinance would seem to be more in keeping with the general pattern of the United States Constitution.

It is further respectfully submitted that *Hague* v. *Committee for Industrial Organization,* 307 U.S. 496, which is submitted by the defendant in support of his contention, not only fails to overrule *Davis* v. *Massachusetts,* but reconciles the decision in the *Hague* case that an ordinance in Jersey City was unconstitutional under which individuals were forbidden to hold meetings or assemblies, to distribute circulars, leaflets or handbills on the public streets

or to speak without permits in the public. In the *Hague* case the Court found that municipal authorities had granted permits to various persons, other than the C.I.O., to speak at meetings in the streets of the city. The Supreme Court, in comparing the ordinance in the *Hague* case with the ordinance in the *Davis* case, speaks as follows (p. 515):

> "The ordinance there in question [*Davis* case] apparently had a different purpose from that of the one here challenged, for it was not directed solely at the exercise of the right of speech and assembly, but was addressed as well to other activities, not in the nature of civil rights, which doubtless might be regulated or prohibited as respects their enjoyment in parks. In the instant case [*Hague* case] the ordinance deals only with the exercise of the right of assembly for the purpose of communicating views entertained by speakers, and is not a general measure to promote the public convenience in the use of the streets or parks."

The Court then goes on to say that the *Davis* case does not rule the facts in the *Hague* case and states as follows (p. 515):

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

This particular declaration has been urged very forcibly by counsel for the defense. It is agreed that this principle

is clearly established. However, in the same paragraph the Court in the *Hague* case declares further as follows (pp. 515-516):

> "The privilege of a citizen of the United States to use the streets and parks for communication or views on national questions may be regulated in the interest of all; is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

It is respectfully submitted that the Pawtucket ordinance, merely because it prohibits an address to a religious or political group in a public park, does not transcend the realm of regulation. It does not absolutely prohibit such an address in the City of Pawtucket.

The Pawtucket ordinance appears to recognize the controversial nature of political and religious addresses and the State of Rhode Island feels it must recognize the fact that political and religious addresses are of a highly controversial nature. The State recognizes further that the expounding of one man's religious dogma or one man's partisan political philosophy over a loudspeaker system in a public park may be very offensive to other members of the public using the park. It may very well be that the City Fathers who drew this ordinance had that situation in mind. Counsel for the defense has urged that the prohibition of controversial subjects and even subjects liable to incite riots and disorder is unconstitutional and the authorities of a municipality are bound not only to allow these discourses but to afford suitable police protection to prevent any ensuing disorder. It is submitted that the

State of Rhode Island does not agree that the Supreme Court of the United States has ever put such an obligation upon any municipality. In the *Hague* case the Supreme Court of the United States cites a brief filed by the Committee on the Bill of Rights of the American Bar Association in which they, as *amici curiae*, say (p. 679):

> "It is natural that threats of trouble should often accompany meetings of controversial questions. But meetings may not be suppressed on that account. The practice under ordinary conditions in our large cities is for the authorities to arrange with the applicants to have the meeting held in a suitable place, and to have enough policemen on hand to quell apprehended disturbances."

The State contends that what is a suitable place apparently is recognized by the Supreme Court of the United States as a proper regulation. It is further contended that it is not necessary for the State to show that actual trouble existed. The threat was present and, as the defendant stated, he did not know whether there would be trouble or not (R. 36).

It would seem that the Supreme Court of the United States does not question the right of a municipality to insist that addresses on controversial subjects be held in such places as will afford it greater opportunity for adequate police protection.

The State of Rhode Island contends as a fact that the ordinance in question is a comprehensive regulatory ordinance, and if it restricts the defendant in activities, which are otherwise legal, for the benefit, comfort and convenience of other members of the public, it also restricts actions of other members of the public, otherwise legal, for the benefit of his or other people's comfort and conven-

ience. The State contends that the ordinance in question is a general measure intended to promote the public comfort and convenience in the use of the public parks; that it does not violate the First or the Fourteenth Amendments to the United States Constitution and is not contrary thereto.

In defendant's motion to dismiss he sets out that his rights are abridged under the Constitution of the State of Rhode Island. An examination of the State Constitution fails to disclose any greater restrictions on the police power or its municipalities under enabling legislation than the Federal. Because the State of Rhode Island was the first sovereignty to establish freedom of religion, the State calls the Court's attention to section 3 of the State Constitution, particularly the following words:

> "And that every man shall be free to worship God according to the dictates of his own conscience and profess and by argument to maintain his opinion in matters of religion; and that the same shall in no way diminish, enlarge or affect his civil capacity."

The State of Rhode Island contends that the ordinance in question does not prohibit or restrict the worship of God or the use of the public parks for that purpose. There is nothing in this ordinance which would prohibit religious services of any kind from being held in the public parks of the City. There is nothing in this ordinance which prohibits or restricts any individual from offering prayer or singing hymns or conducting a religious ritual in the public parks. It is only an address on such an occasion that is prohibited by this ordinance. It cannot be said that freedom of religion is violated in any degree by this ordinance.

It is noted that nothing has been entered in evidence to show that the address given by the appellant was part of a group prayer or worship.

To the contrary, the appellant admitted, in answer to question 22, page 29 of the transcript, that the crowd assembled "to hear this lecture." He further admits in answer to question 33, page 31 of the transcript, that he was "introduced as the speaker of the occasion." In answer to question 29, page 30 of the transcript, the appellant told of advertising passed out to people on the street to "tell them about this meeting, inviting them to come."

Therefore it is respectfully submitted that the appellant presented an address before a group of people who gathered for the purpose of being addressed and were not in attendance for the purpose of holding religious services. This address was not an integral part of a religious service or worship.

The only question before this Honorable Court is whether or not the ordinance was designed to interfere with freedom of speech. The State of Rhode Island respectfully contends there is no other question at issue in the case at bar and reiterates its stand that freedom of worship is not involved. There is nothing in this ordinance which prohibits religious worship or services of any kind from being held in the public parks of the City of Pawtucket. Under this ordinance any individual or group of individuals may go to the parks and offer prayer or conduct a religious ritual. In the case at bar there certainly is no religious ritual. The entire testimony, the entire procedure, is directed solely to this defendant's speech, this defendant's right, as a member of the public, to make that speech. "The question involves only the defendant's right, as a member of the public, to speak in a manner and under conditions which would violate the equal and correlative rights of

other members of the public to a reasonable use of the park for its dedicated purposes" (R. 7). The defendant's argument that a religious address may be permitted in a public park without contravening the concept of church and state is as stated by Mr. Justice Condon (R. 51). ". . . appears to be an act of supererogation." Should this Honorable Court feel compelled to consider this point, it is then respectfully submitted that *Illinois, ex rel McCollum,* v. *Board of Education,* 333 U.S. 203, did deny the use of a public school, tax-supported property, for a period of religious instructions.

Conclusion.

The State of Rhode Island firmly believes that freedom of speech must be vigilantly guarded. As stated by Mr. Justice Condon of the Rhode Island Supreme Court in the opinion rendered relative to the certified questions hereinbefore referred to:

> "Insidious no less than open assaults upon them must be sternly resisted if they are not to be lost by erosion. But we are also aware that true liberty of any kind cannot exist without public order. Preservation of the balance between liberty on the one hand and authority and order on the other has ever been a difficult task for the courts and no less difficult for those immediately charged with the duty of maintaining public order. It should be our constant concern while safeguarding the first not to go so far as to make unduly difficult or perhaps impossible the discharge of the other."

The ordinance is constitutional because, both on its face and as construed and applied, it does not abridge the rights

of freedom of assembly, freedom of speech and freedom of worship, as stated in the First and Fourteenth Amendments to the United States Constitution and sections 3, 10 and 21 of Article I of the Rhode Island Constitution. The ordinance in question is a general measure and promotes public comfort and convenience in the use of the park and is a regulation in the interest of all and not a prohibition of freedom of speech, assembly and worship.

Dated December, 1952.

Respectfully submitted,

STATE OF RHODE ISLAND,

WILLIAM E. POWERS,
Attorney General,

RAYMOND J. PETTINE,
Assistant Attorney General.